

CASES
ARGUED AND DETERMINED
-IN THE-
SUPREME COURT
OF THE
STATE OF LOUISIANA.

WESTERN DISTRICT, SEPTEMBER TERM, 1824.

West'n District,
Sept. 1824.

PHILLIPS vs. PAXTON & AL.

PHILLIPS
vs.
PAXTON & AL.

APPEAL from the court of the sixth district.

The name of
one of the part-
ners, may be the
nom social of
the firm.

PORTER, J. delivered the opinion of the court. This action was commenced on a promissory note, executed by Paxton. Gorton's liability is averred on the ground of his being a partner of Paxton at the time the obligation was executed. Paxton suffered judgment to be given against him by default. Gorton contested his liability, and judgment being given against him he appealed.

Articles of partnership were produced by the defendants on the trial below, by which it appears, that in the month of October, 1821, the defendants entered into an agreement to carry on the business of making saddles and harness—one of the partners (Gorton,) furnish-

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ing a certain sum of money, the other contributing his industry, and also putting in some capital.

Under this agreement, it is clear, the appellant cannot be made responsible for the whole amount of the obligation sued on. The partnership, tho' called by them in the articles a "commercial and special partnership," was clearly that kind of association known to our law as a "particular partnership," in which the partner is only bound for his *virile* share, and not even for that, unless the partner who contracts in his own name were authorised to bind his associate in this manner, or it be proved the debt turned to the benefit of the partnership. *C. Code*, 390, 13, 398, 43 & 44.

The plaintiff, however, rests his right to make the defendant responsible, on ground foreign from these articles of agreement. He says they never were recorded, and that the person under whom he holds, and with whom the debt now sued on, was contracted, had no notice of them; that although the defendants, when they first associated together, may not have contemplated a general and commercial partnership, yet they subsequently altered their views: that this note was given for the

purchase of merchandise: that the appellant's consent to this purchase is proved; his participation in the management of the affairs, establishing the right on his part to participate in the profits, shewn: and lastly, that at the dissolution, a considerable part of the property and debts belonging to the firm passed into his hands.

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All these facts have been proved by the evidence introduced on the trial: and the question is, whether they make the defendant liable as partner, on the note signed by Paxton. He insists they do not—and although his defence has taken a most extensive range, the only part of it, which appears to us worthy of a serious examination, is that founded on the manner the debt was contracted. The defendant relies on several articles of our code, and particularly those which declare that "the debts of the partnership are those contracted by the person who had the power to bind all the partners *in the name of the partnership*. "That the debt is presumed contracted in the name of the partnership when the partner adds to his signature that he signs for the partnership, and not otherwise." To enforce still further these principles, he relies on *Pothier, traité de société*,

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It is clear from the evidence, that the appellant was to participate in the profits expected to be derived from the sale of these goods, and others, which Paxton had previously purchased; and that this fact, and that of his being in partnership, were known in the community where the parties lived. The contract must therefore be presumed to have been made in relation to both; for where one of the partners endeavours to escape from the responsibility created by a contract by which the whole firm profited, the *onus* of shewing that he was excluded, most certainly devolves on him.

Taking it then as a fact, that the vendor of the goods for which this note was given, sold them with a knowledge of the appellant being a partner, and with an eye to his responsibility, does the selling them to one of the partners, by his name, prevent recourse against the other? We have already cited those passages of the law on which the defendant relies. There is nothing in them which says, that a contract for the benefit of a partnership, and binding on them, may not be made by one partner in his own name; though it is true, the legislature by

indicating the manner in which debts may be contracted, have authorised the argument, that in pointing out one mode, they intended to exclude all others. This rule of construction is not without its weight; but being one by which intention is *presumed*, and not *expressed*, it is necessarily subject to be modified by all the other considerations and reasons from which a different meaning could be inferred. We deem it however unnecessary to examine the question how far a contract, clearly entered into in relation to one partner alone, would bind dormant partners who participated in its gain; because we believe that this contract was made with the *partnership* through the name of one of the partners, and in giving it effect according to the intention of the parties, we do not violate these provisions of the law on which the appellant rests his defence.

The defendants, it is placed beyond doubt, entered into a commercial partnership, and traded in the purchase and the sale of merchandize. The whole business, we find, was transacted in the name of Paxton, and no other used. *Now, if a different name than that of one of the partners be of the essence of the partnership, it will follow that there never was any between*

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them. But this conclusion would not be admitted we presume, even by the appellant himself. We are certain it would be in direct opposition to law. For the contract of partnership is that, by which two or more persons agree to put something in common with a view to divide the benefits they expect to make from the same; and only four requisites are necessary to its existence, namely, that each should bring something in either money, property, or industry—that the contract should be for common benefit—that the parties intend to divide the profits in the proportion to the amount put in—and lastly, that condition which is common to all contracts, that its object should be lawful. C. C. 388, 181.

- If all these things belong to the agreement, the name then given to their association is of little importance; they may call it what they please; they may give it the denomination of such a one, & co.; of two or more of the partners; of one, or of all; or they may leave it without any. If they resort to the latter mode, as was done in the instance before us, their contracts are not on that account less binding. Any name, used by the consent of all, binds all. It is not the first time this argument has been used in this court, though it has never been be-

fore pressed with so much earnestness; and it then received from us this answer, that the *nom social* was that which the partners chose to bestow, and that an appellation embracing all the members of the firm was unnecessary.

Ward vs. Brant's syndics, 11 *Martin*, 424,

In this instance, it is in evidence that the partner who is appellant, permitted the other to buy and sell, and carry on the partnership affairs in his own name. We consider this as a clear assent on his part, that the name of this partner should be that of the firm, for all the business done in relation to it. And that it is now too late for him, after hanging out these colours to mankind, to endeavor to escape from the responsibility which in law and in equity and justice he has incurred. *Qui sentit commodum, debet sentire et onus.*

We have not noticed the objection taken to Ogden's testimony, because, under our understanding of the law, enough is shewn by other evidence, to fix responsibility on the appellant.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Thomas, Boyce and Scott, for the plaintiff.
Bullard and Baldwin, for the defendants.

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vs.

VOORHIES.

MULHOLLAN vs. VOORHIES.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court.

No action can
be maintained
on a corrupt
bargain.

The plaintiff charges, he purchased a tract of land at a sheriff's sale, for 1106 dollars, and gave his bond therefor at twelve months, in which the defendant joined him as his surety—it being understood they would be equally interested in the bargain, and afterwards agreed to take in Cleveland, as a copartner—that the land was afterwards sold for 3600 dollars, and the defendant received the proceeds of the sale, and undertook to take up the bond and pay to each of his associates their shares of the profits; that he has not paid the bond which has been put in suit against the plaintiff, whose property has been sold to pay a part of the judgment, &c.

The general issue was pleaded—there was a verdict, and judgment for 600 dollars against the defendant, and he appealed.

The statement of facts shows that Cleveland, the plaintiff's witness, deposed that "Mulhollan purchased the land for 1106 dollars—judge Voorhies was his surety—the deponent was sheriff. It was understood they

were to purchase the land together. *Mulhol-*
lan told the deponent to knock it off to him, and the
deponent should have one third of of the benefit. The
 plaintiff told the deponent he sold the land for
 3600 dollars in Wood's notes. The defendant
 got an order for the notes and accounted to
 the deponent for his share of the net profits,
 after deducting the twelve months bond. The
 profits were 833 dollars 33 cents, which fell to
 the share of the deponent."

The bargain, which this witness discloses, is
 so corrupt a one that it cannot be the ground
 of an action, *ex turpi pacto non oritur actio*. The
 plaintiff agreed with the parish judge, to avail
 themselves of the distress of one of their fellow
 citizens, whose property the sheriff was selling:
 lest, by crying too long the property, others
 might have the opportunity to bid and the bar-
 gain should be rendered less profitable, the *she-*
riff was taken as a partner, and the plaintiff told
 him *if he would knock off the land, to him he would*
have one third part of the benefit. This had its
 effect. The land was knocked off at one third
 part of the price, which the confederates soon
 obtained, and the parish judge paid to the
 sheriff 833 dollars 33 cents—nearly four-fifths
 of the price, at which he had knocked off the
 land.

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Now, the other confederate sues the judge for his 883 dollars thirty-three cents, and a part of the capital employed in the unrighteous trade. They, who come into court with such unclean hands, ought to be told *procul estote profani*, the temple of the justice of your country is the house of God—it should not be made a den of thieves.

The judge erred in sustaining the suit.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the suit be dismissed at the plaintiff's costs in both courts.

Thomas for the plaintiff, *Boyce* for the defendant.

MARTIN vs. HEIRS OF MARTIN & AL.

APPEAL from the court of the sixth district.

Sureties on curators bonds may be sued in the district court, so may beneficiary heirs when a breach of duty is alleged, which renders them responsible in their personal capacity.

PORTER, J. delivered the opinion of the court. The petitioner states, that he is one of the heirs at law of the late Abraham and Mary Martin; that he was a minor from the death of his father and mother, until the 20th of Novem-

ber, 1823, when he became of age; and that John M. Martin, late deceased, was appointed his curator *ad bona*.

He further avers, that John M. Martin furnished, on being appointed curator, bond with Robert Martin and Charles Mulholland, his sureties, for the sum of forty thousand dollars: that he received the amount from the succession of the plaintiff's father and mother, and that he died without rendering any account thereof.

That on the death of J. M. Martin, his succession was accepted with the benefit of an inventory; but that all the proceedings in relation to the administration of his estate were irregular and void; that the property was sold without proper authority, and the proceeds distributed contrary to law.

The petition sets out the property left by J. M. Martin at his death, avers, that the plaintiff has a tacit lien on it, and gives the names of those persons into whose hands it has come.

And concludes by a prayer, that the heirs of the curator, and the sureties on his bond, may be cited, and caused to pay the plaintiff the sum of forty thousand dollars, with interest at five per cent from the time the property came into

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If the suit is
dismissed in the
inferior court,
on a want of ju-
risdiction, the
merits cannot be
gone into in the
supreme court.

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the hands of the curator: that the third possessors of the property on which the petitioner has a mortgage, may be made parties to the suit, to shew cause why it should not be seized and sold to satisfy the judgment in this case.

This petition is met by every species of defence which the ingenuity of the parties, or counsel could suggest. One of them pleads, that the court of probates had exclusive jurisdiction of the cause of action set forth in the petition. The judge of the district court, after hearing evidence in support of the allegations of the respective parties, and argument on the merits, came to the conclusion that the case was one of which he could not legally take cognizance, and dismissed the suit by a judgment of non-suit.

The correctness of this judgment is alone brought before us for revision.

As it regards the sureties on the curator's bond, we think there can be no doubt the court erred in dismissing the petition—for if they could not be sued there, we do not see where they could be attacked. There is nothing in the act establishing the jurisdiction of the probate court, which confers on it the power of examining and deciding on the rights of parties, who are

bound as sureties for those who watch over the interests of minors—nor is there in the nature of the obligation, any necessity it should be examined by that tribunal.

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We think the question equally clear as it respects the beneficiary heirs. They are charged with having sold the estate, and administered it contrary to law; and that all their proceedings are null and void. If this be true, they are responsible in their private capacity, and the court where the action was commenced had cognizance of such a demand.

The reason which influenced the judge to dismiss the suit was, that the sureties would have a right to plead discussion of J. M. Martin's estate, and that he could not order that discussion, as it was administered by beneficiary heirs in the court of probates. To this argument we think the answer given by the counsel of the plaintiff is satisfactory. That where sureties plead discussion, and the plea is allowed; it is not the court who sustains that defence, but the party, against whom it is offered, that is obliged to make the discussion; and that he can go into the court of probates if it be necessary he should to discuss the principal's estate, in the same way that he could pur-

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The third possessors who are appellees have prayed they should have final judgment in their favor; but this prayer cannot be acceded to, unless we examine the case on its merits, and this we do not conceive we are authorised to do. When the inferior court declines to pass on the merits, by the opinion which it entertains in regard to its jurisdiction, this tribunal cannot decide on them; for it can only exercise *appellate* jurisdiction, and a judgment here on the merits, where none had been given below, would be an original one. All that this court can do, is to examine whether the court below erred in refusing to decide on the rights of the parties, not what these rights are. It was said that this tribunal has often decided causes, on points different from that which the court below acted on, and we were referred to a case which went off on the trial in the first instance on a question of prescription, and was adjudicated on in this court on other grounds. These positions do not in the least affect the principle which must govern the case. In those referred to, there was an examination of the merits; and they once gone into, no matter on what

point decided, the whole case was brought before the court. There is an essential difference between pleas such as *prêscription*, *res judicata*, and others of the same class, which delay the progress of the cause, and pleas which decline the jurisdiction. The latter, if sustained, withdraw the whole case from the court; the former, if supported, admit jurisdiction, and are one of the means of defence on the matters really at issue. We are quite satisfied that we cannot examine the question submitted by the appellees. If we did, it would be the first judgment pronounced in relation to them, and that is the very definition of original jurisdiction.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed—and it is further ordered, adjudged and decreed, that this case be remanded for a new trial, with direction to the district judge not to dismiss the same for want of jurisdiction, the appellees paying the costs of this appeal.

Bullard for the plaintiff, *Thomas & Baldwin* for the defendants.

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ROST
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THE CHURCH
OF ST. FRANCIS.

Where an act
of the legisla-
ture revives
another which
has previously
expired; the
latter is only in
force from the
date of the for-
mer.

ROST vs. THE CHURCH OF ST. FRANCIS.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. This is a suit, instituted against a corporation or body politic to obtain remuneration, for the damage which the plaintiff alleges he has suffered by the negligence of the officers of said corporation; which caused the conflagration of their house of worship, from whence fire was communicated to a house occupied by him, and consumed his property to the value of two thousand dollars. Service of the petition and citation was made on Joseph Tangin; as president of the church wardens and head of the corporation, who answered by pleading in abatement and also the general issue. The plea in abatement was that the respondent was not at the time of the alleged conflagration, nor at any time since, either president of the church-wardens, or a warden; as no such officers were at that time in existence, nor have been since elected by the congregation.

This plea being overruled by the district court, and the plaintiff having obtained judgment on a trial of the cause on its merits, the defendants appealed.

From the view which we have taken of the case, and are now about to express, it will be seen, that no necessity exists to consider and examine it farther, than in relation to the first means of defence.

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The members of the church against which the present suit is commenced, were created a *body politic*, by an act of the legislature, passed on the 10th of February, 1813, by which its duration was limited to ten years; consequently it expired with the 10th of February, 1823: but was revived by an act passed on the 17th of March of the same year. The evidence shews that the conflagration complained of took place, on the 29th of the last mentioned month and year.

It cannot be doubted that no corporation existed from the 10th of February, to the 17th of March, in the year 1823. The body was extinct in consequence of the express limitation imposed on it by the creating power. The officers attached to it ceased to exist with the corporation; and consequently the officers were *functi officio*. Had matters remained in this situation, it is evident that the whole congregation could not have been regularly pursued by a citation on officers who no longer represented it, in any manner.

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The only question in which any difficulty of solution is found, is that which arises out of the act of revival. Was it so powerfully retroactive as to bring again into life the body politic, together with its officers? We think not.

The rule that laws ought not to have a retrospective operation, is well founded in justice and reason; and should only from great necessity suffer exceptions. An act of revival brings into life some law that previously existed and had expired; and the living law may operate partially if such be its provisions, or entirely; as in the present case, the former act having been declared by legislative power to be again in force, without limitation or restriction. But this new life is presumed to be given only from the date of the surviving law. It is an existence *de novo*, and after that, the privileges and powers granted by it must be claimed and enforced in the same manner as they were in the beginning under the old law. The act of 1823 gave to the congregation a right to elect church-wardens, &c. but did not continue in office those who had been appointed under the former act, which had expired, and with it the officers thereby created. From this view of the cause, it is clear, that the petition and cita-

tion have been served on a person who did not at the time of service, in any manner represent the corporation.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled: and it is further ordered, that the cause be remanded to be proceeded in according to law, and that the appellee pay the costs of this appeal.

Bullard for the plaintiff, *Baldwin & Deblioux* for the defendants.

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BUFORD vs. VALENTINE.

APPEAL from the court of the sixth district.

PORTER, J. deliverd the opinion of the court.

This is an action to recover back the price of two tracts of land, which it is alleged, were falsely and fraudulently sold to the plaintiff by the defendant, he well knowing that he had no title or pretension to the same.

Interrogato-
ries propounded
to a party in a
suit, cannot be
answered by
his agent.

The defendant acknowledges by his answer that he sold the property mentioned in the petition; but he avers that he had a title to it, and he traverses the fraud.

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The district court found the fraud proved, and gave judgment for the plaintiff. This was a question, of which that tribunal had so much better means than this, to arrive at a correct opinion, that we readily adopt its conclusion. *Vol. 1, 165, 2 ibid. 188.*

But independent of the weight justly attached to this circumstance, the evidence fully authorises the opinion of the judge below. The defendant has principally rested his objections to the decision, on the answer of his agent, to the interrogatories propounded by the plaintiff on facts and articles. We are of opinion that no notice can be taken of it. The questions were propounded to the defendant *party* to the suit. To him alone under our law could they be offered, and he alone had a right to answer them. The plaintiff might well have been willing to trust the conscience of his adversary, but not that of all his adversary's agents. Indeed the very proposition of one man swearing for another, carries with it so completely its own refutation, that we should have felt it unnecessary to notice it particularly, were it not for the authority read by counsel in support of the correctness of the proceeding. Independent of the objections which would apply in any case

to such a practice, this discloses one peculiar to itself. The agent, who answered the interrogatories, was the father of the defendant, and is by law excluded from testifying in favor of so near a relation. So that to receive his evidence in this shape, would be permitting that to be done indirectly which could not be done directly.

There was no necessity to except to these answers; they were nullities in themselves, and they do not appear to have made a part of the proceedings below in any other way, than by being annexed to the answer.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be confirmed with costs.

Bullard for the plaintiff, *Rost* for the defendant.

HERVY & AL. vs. RUSSELL.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. This action was commenced on a promissory note; and a draft drawn by the defendant, which it is alleged was protested. On the

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When the plaintiff fails to make out his case, there will be judgment of nonsuit.

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trial the plaintiff abandonned his claim on the latter ground and proceeded for a recovery on the former.

The general issue was pleaded, and no evidence appears on the record to prove the execution of the instrument sued on. The note of the testimony taken by the judge contains a marriage contract: an authorisation of the parish judge for one of the plaintiffs, who was a married woman, to sue: and the testimony of a witness who swears that he knew one of the partners of Hervey & co. and that she kept a boarding house—all of which do not afford a shadow of presumption the defendant executed the note on which this suit was brought.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, that there be judgment for defendant as in case of nonsuit, and that the appellees pay the costs of the appeal.

Thomas for the plaintiffs, Oakley for the defendant.

BALDWIN vs. HAZZLETON.

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APPEAL from the court of the sixth district.

BALDWIN

HAZZLETON.

MARTIN, J. delivered the opinion of the court.

This is an action for money had and received by the defendant, as sheriff of the parish of Natchitoches, on an execution in favor of the plaintiff. The defendant pleaded a larger sum in compensation, praying judgment for the balance. Judgment was accordingly given for the latter and the former appealed.

Where an instrument is not the gist of the action, a slight variance between that alleged, and proved, is immaterial.

Our attention is first drawn to a bill of exceptions to the district court, refusing to admit as evidence the execution produced by plaintiff's counsel.

Its introduction was opposed because it appeared to bear date of *September, 1822*, and to be issued against John Sibley and *John H. Sibley*, the property of John Sibley being first discussed, while the execution described in the petition is stated to bear date *about September, 1822*, and to be against John Sibley.

As the execution was not the gist of action, which was the actual receipt of the money, we think the variance was not fatal, and the execution was set forth with sufficient certainty: the epithet *about*, prefixed to the month in which it is

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stated to be dated, authorised the production of an execution dated within *three months*, and the execution was in a suit in which John Sibley was the *principal* debtor J. H. Sibley's property was directed to be spared if John Sibley's could be had. On pleading *compensation* and praying judgment for a *balance* due the defendant, the plea of the general issue was waved.

We find no evidence of the claim offered in compensation.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the plaintiff for the sum of two hundred and forty-eight dollars and seventy-five cents, reserving to the defendant his right of action for the alleged claim, and he paying costs in both courts.

Baldwin & Bullard for the plaintiff, *Rost & Holkham* for the defendant.

CONGREGATION OF ST. FRANCIS vs. LAUVE.

APPEAL from the court of the sixth district.

When the plaintiff fails to make out his case, there will be judgment of nonsuit.

MARTIN, J. delivered the opinion of the court. The defendant is sued, as surety of the plain-

tiffs' treasurer. There is not any evidence of their claim against his principal, but an account current annexed by the plaintiffs to their petition. This was certainly evidence against them, but cannot make any for them, as it is not supported by any evidence.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment of non-suit against the plaintiffs, and that they pay costs in both courts.

Desblieux for the plaintiffs, *Rost* for the defendant.

RUTHERFORD'S REPRESENTATIVES vs. MARTIN'S HEIRS.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. This action was commenced in the court of probates of the parish of Rapides, to compel a final partition and distribution of the estates of Abraham Martin, and Mary, his wife, &c.

Purchasers of land at probate sale, cannot call on the succession for the value of improvements put on it by third persons, if it were sold such as it belonged to the succession.

It is a contest between the heirs of these persons, arising out of the manner in which their

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successions had been administered, and partially partaken by said heirs previous to the institution of the present suit. Two of them were dissatisfied with the judgment of the probate court, and appealed to the district court, which rendered a judgment different from that given in the court of probates in the first instance; and from this last judgment the plaintiffs appealed to this court.

The appellants to that court were Fr. Bynum and his wife, and W. Turnbull and his wife, who are here appellees.

The principal difficulty in fixing a just basis for the partition demanded, arises out of the manner, in which the property belonging to these successions was purchased by the heirs, at a probate sale thereof. In buying, they acquired property to various amounts, and became responsible for the prices to the mass of the heirs for any surplus above their individual shares, &c. The present appellees appear to have been amongst those who bought beyond their dividends, as evidenced by the proces-verbal of the sale. They now claim deductions from these apparent prices, on account of want of title in their ancestors, in some of the lands purchased, a deficit of quantity in others,

and a failure to obtain possession of some personal property. The moveable property which Bynum complains of not having received, in pursuance of this purchase, forms a very considerable item in his wife's claim of deduction; but so far as proven by the testimony of Cureton and Mulholan, ought to be admitted. Of the defects in several tracts of land purchased by Turnbull, and which constitute a part of his wife's portion of the estates of her ancestors, the record appears to us to contain sufficient evidence, viz: the recovery in the suit of Scott vs. Thomas, in relation to the tract on B. Rapide, and the testimony of McCrumen, the surveyor, in respect to the two on the right bank of B. Robert. A *pro rata* price, for these deficiencies, in comparison with that given for the whole number of acres or arpens, supposed to have been bought by the purchaser, ought to be allowed as a deduction from the charges of the succession against her.

The most important matter of dispute between the parties litigant, and perhaps most difficult of settlement, is the claim of reduction in the price of the tract of land of 800 arpens, purchased by Bynum and his wife, situated on B. Rapide, and to which he alleges that the

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HEIRS.

successions of A. & M. Martin had not at the time of sale a full and complete title, &c.

It is admitted, that this tract of land formed a part of the community of acquets and gains of the ancestors of the appellees, at the time of the death of A. Martin, the husband, subject to be divided between his heirs and the surviving wife in equal portions. Subsequent to the death of their father, and previous to that of their mother, three of his heirs, viz: John M., Robert and Coleman Martin, conveyed the whole of said tract of land to a purchaser, and bound themselves in warranty. Coleman died before his mother, and she by law became his heir; accepted the inheritance without the benefit of an inventory, as none is shewn or alleged to have been made; and consequently subjected herself to the performance of all his obligations; among which was that arising from the warranty, of at least one third of the value of the land sold, as above stated. Notwithstanding the incumbrances produced by this sale from part of the heirs of A. Martin, on the property thus alienated; at the probate sale of the successions of both husband and wife, it was sold as if the title to the whole had not been impaired or invalidated to any part thereof; and

at this sale Bynum and his wife became purchasers for the price of 35,000 dollars. If by this purchase the buyers had obtained a clear title to the property, they would be answerable to the rest of the heirs for five-sixths of the price. But they could acquire an indefeasible right to that portion alone which had not effectually been alienated by the three heirs, who sold and conveyed to A. Jackson. At the time they made that sale, they had a right to three-fourteenths of the whole tract, as heirs to their father. They were however bound in warranty to the vendor for the whole. The mother who succeeded to Coleman as heir, and who was owner of one half the land as partner in the acquets of her husband and herself, became in her capacity of heir to her son responsible to his vendor, in warranty to the amount of one third of said tract of land. In consequence of this obligation on her part during her life, and which decended to her heirs after her death, her succession may be considered as reduced in relation to this particular property, to one-sixth thereof instead of one-half. Two of the vendors to Jackson, viz: J. and Robert being heirs to their mother, each for one-sixth part of her succession, acquired one-third of her re-

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maining sixth on the land by them sold and transferred to their vendor title to that amount in addition to the three-fourteenth of the whole tract as acquired from their father's succession and sold by these and Coleman. The price given by Bynum and his wife may be considered as representing the thing bought, and for which he ought to be held responsible to the mass of the heirs of A. and M. Martin (except John and Robert,) for that portion alone which corresponds with the quantity of land to which he acquired a just and legal title from the successions of their ancestors; and this will be that which remains after deducting one-third and three-fourteenths of the whole, and one-third of a sixth part. We are of opinion that the appellees ought to be allowed all reasonable and ordinary expenses to which they were subjected in gaining possession of the land, thus bought at the probate sale, as above stated.

The principal error into which the district court appears to us to have fallen, is the allowance of a deduction on account of improvements made on the land purchased by the person then in possession, under the sale from John, R. and C. Martin. It is true that the pur-

chasers under the successions of A. and M. Martin might possibly have been bound to remunerate the bona fide possessors for their ameliorations of the property ; but they bought it such as it appertained to these successions, that is, without improvements, and the price of 35,000 dollars must be considered as paid for the naked land.

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It is therefore ordered, adjudged and decreed, that the judgments, both of the district court and court of probates, be avoided, reversed and annulled. And it is further ordered, that the cause be remanded to the court of probates with instructions to the judge thereof to proceed to the partition and distribution of the estates of A. and M. Martin, in pursuance of the principles laid down in this opinion, the costs of the appeal from the district court to this, to be paid by the appellees, &c.

Thomas for plaintiffs, *Johnston, Wilson* and *Oakley* for the defendants.

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VOORHIES
USE OF CAPPEL
vs.
MULHOLLAN.

A plea of *res
judicata* sustain-
ed, if it appear
the party claim-
ed the same
thing in ano-
ther suit, where it
was disallowed.

VOORHIES' USE OF CAPPEL, vs. MULHOLLAN.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court.
The plaintiff sues on an obligation of the de-
fendant, originally given to Voorhies, and by
him transferred to Cappel.

The defendant did not deny the obligation
but alledged that Voorhies owed him a large
sum, for that he, Cleveland and the defendant
purchased together a tract of land for 1,106
dollars. That the defendant paid two-thirds
of the sum, &c. Further, that the plaintiff
theretofore sued the defendant for the same
cause of action, and the latter had judgment.

There was judgment for the defendant, and
the plaintiff appealed.

McCummin deposes that he had a twelve
months bond, which he received from the
sheriff of Avoyelles, subscribed by Voorhies
for 700 dollars—which sum Voorhies paid the
sheriff, and the sheriff to the deponent, in Feb-
ruary, 1822.

Cleveland, the sheriff, deposed he understood
from Voorhies that the obligation sued on was
given in part payment of two negroes sold by
him to the defendant—that Voorhies was the

defendant's surety in a twelve month bond for 1106 dollars; in December, 1820, the defendant gave his part of a note for 3600 dollars, the joint property of Voorhies, the defendant and deponent, and the obligation now sued on, for the said slaves; Voorhies failing to get payment of the note sued Wells, from whom it came, obtained a judgment, which remaining unsatisfied, he sued the present defendant and failed. Voorhies then sold the claim to R. Martin, for a tract of land and a note for 600 dollars—for which he has judgment; the witness knows nothing about the bond, but what is here related. He received 833 dollars 33 cents from Voorhies, as his share of the \$3600.

The record of Voorhies' suit against the present defendant was introduced.

In this latter suit the plaintiff failed. The statement of facts shews, the record of the suit Voorhies vs. Wells was read: that Cleveland deposed that he, Voorhies and Mullholland, bought in partnership a tract of land for \$1106, giving a twelve month bond, which is yet unpaid. The deed was given to Mulholland, and Voorhies became his surety. Mullholland sold the land to Wells for \$3600, and received the obligation and papers referred to in

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the record of the suit Voorhies vs. Wells. On receiving an assignment of that obligation, Voorhies paid the deponent the third of the profit in this speculation, \$833'33 cents, and gave Mullholland two negroes and his note for \$500—Mullholland acted as the agent of all the parties in making the sale of the land to Wells, and receiving the obligation for \$3600. Voorhies assented to the sale. The deponent understood the draft given in settling the concern is for a \$2494.

It appears clearly that the note now sued upon—and the \$833 33, to which Mullholland was entitled as his share of the profits in the land speculation, constituted the price of two negroes, sold to him by Voorhies, which was claimed by the latter, and made part of the \$3,600, the whole amount of Voorhies' claim.

In the said suit Voorhies' claim for the \$500 now claimed was considered and disallowed, and if it was improperly so, he ought to have appealed—but the judgment unappealed from constitutes the *res judicata* alleged by Mullholland.

It is therefore ordered, adjudged and de-

creed, that the judgment of the district court be affirmed, with costs.

Bullard & Boyce for the plaintiff, *Thomas* for the defendant.

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BAILLIO & AL. vs. WILSON.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. This is an action commenced in the district court, against the defendant, tutrix of her minor children, beneficiary heirs of the late James H. Gordon, for a debt contracted by said Gordon in his life time. Judgment was given against her, and she appealed.

The probate court has exclusive jurisdiction of claims against a succession, administered by minor heirs.

Error has been assigned on the face of the record, that the court in which the suit was commenced, had no jurisdiction of the cause, that it belonged exclusively to the court of probates. Of that opinion is this court, and after the repeated judgments rendered by this tribunal, that creditors of an estate accepted with the benefit of an inventory, must go into the court of probates, and be there paid according to the rank and order of their privilege, we deem it is unnecessary to go into the subject

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at length. The circumstance of the creditor having a mortgage does not take him out of the general rule. *C. Code*, 178, art. 138. *De Ende vs. Moore*, vol. 2, 336.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that the petition be dismissed, the plaintiff paying costs in both courts.

Thomas & Baldwin for the plaintiffs, *Wilson* for the defendant.

WILSON vs. BAILLO & AL.

The court of probates has exclusive jurisdiction of claims against an estate, administered under the benefit of an inventory.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. This action was commenced by an application for an injunction. It is unnecessary to state, the proceedings at length for they present substantially the same question with that just decided, between the same parties; whether the defendants have the right to pursue the plaintiff, who administers her late husband's estate, with the benefit of an inventory before the district court? We think they have

not. The only difference, between this case and the other, is that, in this they proceeded by the *via executiva* instead of an action in the ordinary way. This, in our opinion, makes no difference. The jurisdiction, given to the probate court, in questions of this kind, is founded on reasons which are not in the least affected, or shaken, by the mode of relief which other tribunals may afford.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court dissolving the injunction granted in this case be annulled, avoided and reversed : that the original order enjoining the defendants from prosecuting their claim before the district court be revived and made perpetual, and that the defendants pay costs in both courts.

Wilson for the plaintiff, *Thomas* and *Baldwin* for the defendants.

FERGUSON & AL. vs. THOMAS & AL.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court.
This action was commenced on an obligation

Inconsistent
pleas cannot be
received.

Private writ-
ing not made
double, is good

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as a commence-
ment of proof.

A promise to
deliver cotton
in payment of a
debt, which the
obligee is to sell,
is not discharg-
ed by the death
of the latter.

by which the defendants promised to deliver
a certain quantity of cotton to the plaintiffs.

The defendants pleaded as follows :

They denied all and singular the allega-
tions contained in the plaintiffs petition,

The right of the plaintiffs to sue, because
the obligation was personal to George Rich, a
deceased partner in the house of Ferguson &
Rich, who is represented in this suit by his
mother and heir's,

The right of one of the plaintiffs, Rebecca
Rich, because she was not the heir of George
Rich,

And lastly, that the plaintiffs could recover,
because the contract was a synallagmatic
one, and two copies of it were not made ac-
cording to law.

No evidence appears in the record to estab-
lish the execution of the instrument sued on, but
the plaintiffs insist the want of this proof is
supplied by the pleadings.

This court has held in several cases, that
where a defendant pleaded inconsistent pleas,
such as joining that of payment and satisfaction
to the general issue, or in addition to a plea
that he did not sign the note; an allegation that
he was not of age when it was executed, and

that the instrument was entered into without any valid consideration, we should consider the general denial as waved, because the fact disclosed by the party himself forbid any other construction.

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When a man says he has paid his note, it is an acknowledgment that it once had an existence. When he affirms, that it was entered into without a good and valid consideration, he admits that it was executed. See 8 *Martin*, 492, 11 *ibid.* 640. vol.1 127, 412.

This case, it appears to us, comes within the principle under which these cases was decided. The defendant joined to his answer, that he did not sign the note, an averment, that "the obligation sued on is a synallagmatic agreement, containing stipulations and agreements on the part of all the parties who have a distinct interest, and was not executed in as many originals as there are parties." This is surely an admission that it was executed. If it had never been made by him, as the general issue implies, it could not be defective, because it was not made double.

This opinion brings us to the merits of the dispute. The obligation sued on was, as we have stated, for the delivery of a certain quantity of cotton. It recites as a consideration for

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the promise, that indulgence should be given in the proceedings on two twelve months bonds, one in favor of Walter Turnbull, and the other in favor of the then firm of Ferguson & Rich. The defendants bound themselves *in solido*, to furnish on or before the first day of January next ensuing the date of the agreement, a sufficient quantity of cotton in bales to pay the amount of the bonds with costs: the said Rich to ship the cotton, and apply the nett proceeds to the extinguishment of the said bonds. This agreement is signed by the obligors alone, and to the plaintiffs prayer of recovery they now object,

That the contract was not executed in as many originals as there are parties.

That the contract was a personal one, and that Rich, the party who was to sell the cotton having died, they were not obliged to confide this trust to his heirs and representatives.

On this last point the court below gave judgment against the plaintiffs, and they appealed.

The article of our code which requires that there should be as many originals as there are parties having a distinct interest, was made to insure to each the means of enforcing the a-

greement, and applies to these cases where the contract is perfectly synallagmatic, or bilateral: that is, where the obligation which each of the contracting parties enter into, is equally the principal obligation of the contract. As in the contract of exchange, partnership, &c. and does not govern a case such as this, where tho' there are two parties, as there necessarily must be to every contract; the obligation of one was only incidental, and a consequence of a performance of the other. The promise here was merely to make a *dation en paiement*, and there was nothing stipulated on the part of him who was to receive it, in which the other party could have had an interest antecedent to his own performance. We therefore think it was unnecessary he should have had an original. *Potie's Obligations*, no. 9. Were we even to agree with the appellees, that this was one of those cases where there should be as many originals as parties, they would still be unable to escape from their obligation. The law does not say the act shall be null and void, for want of this formality, it declares they shall not be valid, (*ne sont valables*,) that is, that the agreement is not perfect, that it does not make full proof of what is therein contained. But al-

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tho' it may not be sufficient for that purpose, it is still a writing emanating from the party against whom it is produced, and is a commencement of proof in writing. This is the construction put on the article of the Napoleon Code, from which ours is taken; and of its soundness we do not think there can be a doubt.

The second point, and that on which the inferior court decided the case, appears to us free from any difficulty. The defendants agree to pay certain debts in cotton, and the person who was to receive it, promised to sell it, and place the proceeds to their credit. They now say they are discharged from their obligation, because the payee has deceased, and that they have not confidence in any of his heirs and representatives. This may be very true, but why they should be discharged from their engagement, and the heirs lose their debt, because the appellees have not confidence in them, is what we are unable to understand. The general rule is, that all the obligations of the ancestor pass to his heirs, active as well as passive. The exceptions to this rule are these obligations, which result from agreements, in which the personal qualities of the person promising are to

be supposed the leading motive of the contract, and where the want of them cannot be supplied by any other, or compensated by pecuniary damages. Such is the confidence we repose in our physician, who assists us in sickness, the painter whom we may desire to make family portraits; and in case of their decease, their heirs cannot demand that they shall be permitted to supply their place or perform their contract. But, an engagement to ship cotton may be performed by any one; the qualities of mind are not the leading consideration that induced the contract. Pecuniary responsibility is the moving cause, because the non-performance can be compensated in damages, and no objection can be made to the heirs, on that score, where they are the creditors of the person whose engagement they seek to enforce.

On examining the record, for the purpose of giving final judgment, we find there is not sufficient evidence to enable us to do so. The obligation on which the defendants are sued, states they have bound themselves to pay two twelve months bonds, and these bonds are not produced, nor is there any other evidence by which the amount of either can be ascertained.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, that the case be remanded for a new trial, and that the appellees pay the costs of this appeal.

Johnston & Wilson for the plaintiffs, *Thomas* for the defendants.

COLLINS vs. WELSH.

A bond given before an order of court has been made, is as binding as if executed after.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. In this case the plaintiff obtained a writ of injunction to stay proceedings, on the part of the defendant, which he was then carrying on against the former, for the purpose of enforcing the execution of a judgment which he had previously obtained against him for the price of a certain tract of land. The injunction issued on the allegation and proof of a suit instituted by the widow and heirs of A. Fulton, against the present plaintiff, for the land which had been sold to him by the defendant, as endangering his title thereto, and disturbing him in his possession and quiet enjoyment.

On the hearing of the cause, the court below

dissolved the injunction in consequence of a tender of a bond with sureties to save the plaintiff harmless from the effects of the claim set up by Fulton's widow and heirs, and from this decision he appealed; &c.

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We have no doubt of the legality and propriety of issuing the injunction in the first instance. The ground of objection to its dissolution, taken by the appellee's counsel, is that there was no previous order of the court for giving and receiving such a bond; and that consequently it is not obligatory on those who have signed it. If it be legal and just to let loose an execution in a case similarly situated with the present, where the plaintiff in execution gives bond and security to indemnify the defendant against threatened injury; it is difficult to conceive how the manner of executing such an instrument, either previous to the order which dissolves the injunction, simultaneously therewith, or immediately subsequent, but before the issue of execution can affect its obligation. The principal consideration for the defendant is, that the sureties be good and solvent; this the court below was competent to determine, and by ordering the bond to be received, have virtually decided that fact in

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the affirmative; and the evidence of the case exhibits nothing in contradiction to the correctness of that decision.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Thomas for the plaintiff, *Baldwin* for the defendant.

SMOOT & DINSMORE vs. BALDWIN.

Sale of slaves
not followed by
delivery, will
not prevail
against a second
purchaser to
whom they are
delivered.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. This is a suit for the recovery of certain slaves, described in the petition of the plaintiffs. The answer of the defendant contains the general issue, and further sets up title to the property in dispute, under a purchase bona fide, accompanied by an actual delivery of the things sold. He obtained judgment in the court below, from which the plaintiffs appealed.

The evidence which they offer in support of their claim and title, is a bill of sale from one G. C. Russel, to them, containing a clause of de-

feasance, on condition that the vendee should save them harmless from the effects of a suretyship, into which they had entered for his benefit. They further shew a judgment of a court of the state of Alabama, by which they were condemned to pay the amount for which they had become sureties, and satisfaction of said judgment. A witness introduced to prove the laws of Alabama, testifies that the instrument above cited is a valid contract of sale between the parties, but that as it was not accompanied by a tradition of the slaves therein mentioned to the vendees, it cannot affect a subsequent purchaser, in good faith, to whom a delivery may have been made; as settled by decisions of the courts of that state.

The defendant has supported his plea of title by an authentic act of sale from the original owner of the slaves, and possession under it. There is no evidence in the record which shews that he had knowledge of the prior sale to the plaintiffs, previous to his contract with Russel, or any want of integrity on his part in the bargain.

Whether we take, as the basis of our decision in this case, the laws of Alabama, (as they

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are shewn by the testimony contained in the record,) or those of our own state, the result must be the same.

A contract of sale is perfect, in relation to third persons, only after tradition of the thing sold. This, it is true, may be legal and fictitious; when the intention of the parties is manifested by expressions to that effect in the act of sale, &c. But the deed exhibited by the appellants contains no expression of delivery.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Thomas for the plaintiffs, *Baldwin* for the defendant.

CALVIT vs. COMPTON & AL.

The vendor cited in warranty who declares he transferred and delivered to the vendee, but has a just and legal title, does not acknowledge title in his vendee.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiff claims sundry slaves, and their increase, in the possession of the defendants. They pleaded the general issue and prescription, and called on the representatives of their vendor in warranty.

The plaintiff had judgment and the defendants appealed.

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The statement of facts, shows that Mulhollan deposed the plaintiff brought over from Mississippi, a negro woman, named Mary, in 1809 or 1810, she was purchased at the sale of Abram and Mary Martin, by Rutherford, the defendants' vendor. She had then two or three children. She is the one who was claimed in the suit of Hicks & wife vs. Martin. When Calvit left Mary, he took Sylvia, a woman slave, whom he kept till she died, which was after the sale of Martin's estate. Negroes pass, in Mississippi, by verbal sale: her value, \$75 per month.

The documents produced are the sale of Martin's estate, at which Mary and her two children were bought—Rutherford's sale to the defendants—the record of the case of Hicks & wife vs. Martin. 9 *Martin*, 47.

It is admitted that slaves are personal property in Mississippi, and pass by verbal sale.

We think the district judge did not err, in recognizing the plaintiff's title. He brought the slave over from Mississippi.—It is urged he took another in her room, and so there was an exchange—but the contract of exchange of

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slaves, as well as of that of sale, must be written, and parol proof of it cannot be received.

A written proof is such as results from the answer of the present plaintiffs, when called in as warrantor by Martin in the case of Hicks & wife. He there said, he transferred and delivered two slaves, but he concludes he has a *just and legal title* in them. The transfer and delivery must be considered as one which did not vest a title.

The plea of prescription is not supported. It does not appear the representatives of Ruth-erford ever bought.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Johnston for the plaintiff, *Thomas* for the defendants.

ENGLISH vs. LATHAM.

The penalty cannot exceed double the amount of the injury.

An attorney cannot become a witness in a

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court.

The plaintiff claims a penalty of \$800, which the defendant bound himself to pay, if he did

not return after one month, or as soon thereafter as he should be thereunto required, an indentured mulatto man, delivered him by the plaintiff.

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The defendant pleaded the general issue—want of consideration in the contract—the presumed freedom of the servant, he being a mulatto.

Witness in a
cause in which
he is employed,
by having his
name stricken
off the record.

There was a verdict and judgment for the defendant, and the plaintiff appealed.

The statement of facts shews that the written contract, on which the action is brought, was proven to have been duly executed by the defendant.

Yocum deposed that, after the defendant had the mulatto man for upwards of a month, he made a formal demand of him, by authority from the plaintiff, and the defendant did not deliver him. The defendant's attorney informed the plaintiff he could have the man, by producing his title to him. The plaintiff appeared satisfied, and said he would—but afterwards said the attorney had used him ill, by running him to costs. The plaintiff was to have had \$200, if he could have had the mulatto, as he heard from the plaintiff. He never got the mulatto to the deponent's knowledge.

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The evidence appears to us to have supported the allegation of the petitioner. The plea of the general issue must yield to the proof of the execution of the instrument on which the suit is brought. The instrument shews the consideration of the contract, in the delivery of the servant by the plaintiff to the defendant; and the presumption of freedom resulting from the color of the servant was destroyed by the proof of his being a bondsman, as is acknowledged in the instrument. It therefore appears to us the verdict cannot stand.

Were we inclined to disregard it and assume the facts as we should in establishing the plaintiff's claim, we would be unable to ascertain its amount. We could not give the whole penalty, because nothing induces the idea that it is not more than double the amount of the injury sustained by the plaintiff. *La pena puesta en gran cantida, no se extiende a mas del dos tantos. Fuero, 1, 11, 5.* Such was the provision of the Roman law.

As we have no datum from which any calculation may be made, we must remand the case.

This renders it necessary to examine a bill of exceptions taken by the defendant, to the

opinion of the court, on refusing to receive as a witness for him, a gentleman, who had till then been his attorney on record, who for the purpose of removing the disability imposed by the act of assembly, had his name struck off from the docket and renounced his fee in the cause. We think the judge did not err. 1 *Martin's Digest*, 537.

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—
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It is is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the verdict set aside, and the case remanded for a new trial: and it is ordered, adjudged and decreed that the plaintiff and appellee pay costs in this court.

Bullard for the plaintiff, *Rost* for the defendant.


—
SHIFF & AL. vs. WILSON.

APPEAL from the court of the sixth district.

PORTER, J. The petitioners state that the defendant was wife of the late James H. Gordon, who was their debtor; that at his decease, she took possession of all his estate, real and

The husband may be surety for the wife in an appeal bond. Courts in this state cannot enlarge their jurisdiction by fictions.

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personal, retains it in her possession, and uses it as her own: that she took an active concern in the affairs of the community: that she did not make a faithful inventory of the property: and that she has concealed and made away with part of the effects thereof: by reason of all which, she has made herself personally responsible for the debts contracted by her husband.


They also pray that judgment may be given against her as tutrix to the minor children and heirs of the said Gordon, and that the same be satisfied out of his estate, in her hands to be administered.

To this she pleaded several pleas, one denying all the facts on which her personal liability is charged; and the other declining the jurisdiction of the court, and averring that the case was one properly cognizable by the court of probates: the others do not require to be mentioned.

The cause was submitted to a jury on special facts, whose finding in the opinion of the court below, having negatived these averments in the petition, which charge the defendant as liable, in her private capacity; but having also found that the debt was due by the estate of

James H. Gordon, it gave judgment that the plaintiffs recover from the defendant the sum claimed in the petition, to be levied from the goods and chattels of said estate, in the hands of the defendant, tutrix to her minor children, to be administered.

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From this judgment the defendant appealed, and the plaintiffs on the appeal have come into this court, and prayed that the judgment might be so amended, as to declare and make her responsible in her private capacity, for the amount ascertained to be due them.

Previous, however, to filing this prayer for amending the petition, the plaintiffs moved to dismiss the appeal, on the ground that the husband of the defendant had signed the appeal bond as surety, and that he could not legally do so, as he was also defendant in the cause.

The husband who appears in an action where his wife is sued for debts antecedent to the coverture, is only nominally defendant, and his presence is required, not because the judgment can affect him, but because it is necessary he should watch over and protect the interests of his wife, who, during marriage, is considered, in regard to judicial proceedings, as a minor, and incapable of defending herself. The

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judgment rendered in this case is against her alone; and if he have the other qualifications, which the law requires in judicial sureties, we are entirely satisfied that the circumstance of his being made defendant for the purpose of protecting the interests of another, does not prevent him from acting as surety. By giving bond in this capacity he furnishes that security, *in addition to the responsibility of the defendant*, which the law contemplated in requiring another person than the party cast in the suit to sign the appeal bond.

This brings us to the question of jurisdiction. The defendant complains, that the judgment rendered here, is one which could not be legally given against her, by the district court; that the court of probates has exclusive jurisdiction of the settlement of estates administered by the representatives of minor heirs; and that the decree having negatived all idea of personal responsibility, the court could not give judgment against her in her representative capacity. This position, so far as it assumes exclusive jurisdiction to the probate court, of claims against successions represented by others, than heirs arrived at the age of majority and accepting purely and simply, is too

clearly supported by law, and too solemnly recognized by repeated judgments of this court to be now questioned. The plaintiffs, therefore, with great propriety, have not contested the general rule, but they contend that the court, having obtained jurisdiction, by those allegations in the pleadings which charged the defendant with acts that made her responsible in her personal capacity, could with propriety, and without exceeding the powers vested in it, give judgment against her in her character of administratrix. But to this argument we are as little prepared to give assent, as we would to that which would have asserted this right in the court, on pleadings conformable to the truth of the case. Allegations of the parties confer the power on these tribunals in which they are made, to examine the case which they set out, if that case be one proper for the court to take cognizance of; but they do not invest it with authority to investigate causes which the law has not assigned to it. If such were the consequence, then it would follow that the tribunals of justice in this country would be unlimited in their jurisdiction, and the parties litigating could contract their powers, or enlarge them, as it suited their interest,

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caprice, or necessities. To what difficulties this would lead, it is almost unnecessary to state; by the operation of this principle, the whole jurisdiction of the court of probates would be taken from it; the settlement of estates, instead of being made upon an examination of the claims of all interested, and with a due regard to the legal rights of the respective creditors, would be thrown into utter confusion, and litigation multiplied, and costs augmented without any rational object being attained. Nor would the evil be confined to that court, it would extend to all in the state. By the same process of reasoning, the criminal court of Orleans could entertain a question in regard to a land title, or a justice of the peace give judgment for \$10,000. All that would be necessary for their exercise of this authority, would be an allegation of crime before the former, and the statement of a debt within the jurisdiction of the latter. We know of courts in other countries, in England particularly, taking on them, by adding to a charge of those things of which they have cognizance; other matters not originally within their jurisdiction, the right to investigate the latter and decide on them. But in this country, where the tribunals

of justice derive their authority from positive law, and have just so much power as is conferred on them, and no more: where each order of magistracy, judicial, executive, and legislative, are bounded by the constitution, and can only move within the orbits assigned them? the idea that any branch of our government may enlarge its limits, or increase its power, by its own act, cannot be for a moment tolerated. If we could extend our jurisdiction by fictions, we might also create them in each particular case, and pass not on facts which were proved, but on those we imagined.

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We are therefore clearly of opinion, that the allegations in the petition, which gave jurisdiction to the district court of a case within its authority, did not justify it in giving judgment on matters belonging exclusively to another tribunal, and that the judgment rendered in this case was null and void, and must be reversed.

It remains however to consider whether that court did not err in not rendering judgment against the defendant in her personal character. An examination of the facts, on which this judgment is demanded, need not now be gone into, because the opinion we entertain on a bill of exceptions, taken to the opinion of the district

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judge, permitting certain facts to be submitted by the defendant to the jury, requires us to remand the cause. As to that part of it, which relates to the relevancy of the fact, as not growing out of the pleadings, we think there is not any foundation for it. The ground of the action is, that the defendant made herself personally liable by various acts in relation to the estate of her deceased husband: the answer meets all these facts, in detail, and denies them. The questions submitted to the jury, fairly arose on the issues joined, and were necessary to a correct understanding of the conduct of the defendant. As we said in the case of *Livingston vs. Heerman*, parties may present to the jury, facts which go to establish the title set up, although these facts should not be set forth in the petition: it is true, that they must not be at variance with the allegations in the petition and answer, but the facts are always pertinent where they tend to support the claim set up. 9 *Martin*, 710.

As to that part of the exception taken, which objected to the questions submitted to the jury, because the *intention* or *design* with which the defendant had done certain acts, more difficulty exists. We are not prepared to say that

there may not be some acts done by a widow, in relation to an estate, so equivocal in themselves, that the intention or design with which they are committed, may not be a proper subject for enquiry and decision by a jury on special facts submitted. But whether she has done *any* act in regard to the community, *with an intention* to accept it, appears to us too general. There are many acts by which a widow may lose her right of renouncing the acquets and gains, and make herself responsible for the debts, no matter what may be her intention and design. In regard to these acts, if the submission of intention was made to control their legal effect, it was erroneous; if not with that design, it was useless. The cause must, therefore, be remanded on this ground; and there is also another consideration which would induce us to send it back, if that already mentioned were wanting. There is a most violent presumption created by the verdict, that the property retained by the widow, and not sold, makes a part of her *biens propres*; though it is not proved so clearly as to enable us to act on it as a fact legally established. The case indeed does not differ from that of *Cox vs.*

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the present defendant, decided at the last term of the court. Vol. 1, 629.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided, and reversed; that the case be remanded for a new trial, with direction to the district judge not to permit the defendant to submit to the jury the intention or design with which *any act* was done in relation to the estate of the late James H. Gordon: it is further ordered, adjudged and decreed, that the appellee pay the costs of the appeals.

Baldwin for the plaintiff, *Wilson* for the defendant.

ROBERTS vs. RODES.

APPEAL from the court of the sixth district.

Motions for new trials are always addressed to the legal discretion of the court.

In the action of redhibition, the thing purchased is returned, and the buyer gets back what he gave for it.

PORTER, J. delivered the opinion of the court.

This is a redhibitory action. The plaintiff states that he gave in exchange for the slave, which forms the subject of the present suit, and two others, a house and lot, situated in the town of Natchitoches; that one of these negroes called Eliza, was, at the time of the contract, afflicted with redhibitory defects, and subject

to an incurable disease, of which she died. He also avers that the defendant knew of these defects at the time of sale.

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The action was commenced by attachment, and by citation on the agent or attorney in fact, of Rodes, who was stated to be absent from the state. The attorney appointed to defend him pleaded, that the case was not one which could be commenced by attachment; that the facts alleged in the petition were not true; and that the action was barred by prescription.

The service of the petition on the agent of the defendant, whose authority was not disputed in the court below, renders it unnecessary for us to examine whether this was a case which could be legally instituted by way of attachment.

The evidence spread on the record, fully authorises the verdict which the jury rendered in favor of the plaintiff, and we are of opinion the district judge did not err in refusing a new trial. Motions of this kind are ever addressed to the sound legal discretion of the court, and they should never be granted, unless the application discloses matter sufficient to render it probable that justice has not been done, and

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that a re-examination would vary the result. That which the defendant swore to here, would not in our opinion, have produced any such consequence, opposed to the strong testimony which established on the trial the justice of the plaintiff's pretensions.

But the disposal of the questions raised in argument, brings us to what we consider the greatest difficulty which the case presents. We have already seen that this action is instituted on a contract of exchange, by which a house and lot were given for three slaves. The judgment of the district court is, that the plaintiff recover of the defendant, the sum of six six hundred and fifty dollars in money. This is not rescinding a contract of *exchange*, but a contract of *sale*; or in other words, a different contract from that which the parties entered into. Redhibition, according to our code, is the cancelling of the sale on account of some defect in the thing sold, such as may be sufficient to oblige the seller to take it back again, and have the sale annulled. *C. Code*, 356, art. 65. Were there no other provision in our law but this, it would necessarily follow, that in annulling the contract, the parties should be replaced in their original position; the plaintiff

giving back what he originally received, and getting in return what he had given for it. A reference to other works of authority places the subject beyond any doubt.

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"Redhibitoria es bolver la cosa comprada, el comprador al vendedor, y el bolverse el precio que dio por ella. Curia Philip. lib. cap. 13, nos. Verbo Redhibitoria." The price given here was not money, but a house and lot; or, strictly speaking, there was no price, for the contract was not one of sale.

Pothier treats of this subject with his usual accuracy, and gives the most satisfactory information on the point now under discussion: "L'acheteur (he says,) est en droit de demander par l'action redhibitoire la résolution et nullité du marché et qu'en consequence les choses soient remises en meme état que s'il n'étoit pas intervenu." Pothier, traite du contrat, de vente, no. 217. In support of this doctrine, he cites the Digest, liv. 22, tit. 1, l. 23 & 60.

There is some difficulty in applying these principles to the case, as only one of the slaves is afflicted with redhibitory defects, and the property given in exchange was a house and lot, which most probably is not susceptible of such division as would enable a portion pre-

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cisely equal to the value of the property now sued for to be returned. By law, the vendee, who acquires several slaves by one contract, is not permitted to annul the whole contract for a defect in a part of the objects purchased. 6 *Martin*, 689. This rule, however of necessity, yields to cases where, from the nature of the agreement, a partial rescision cannot take place, and there is the same necessity that the vendee should exercise it for the whole. For there is no other way that the parties can be replaced in their original position, or that the thing given as a consideration can be restored.

The pleadings and evidence do not enable us to give final judgment according to the view we entertain of the legal rights of the parties. We think the cause should be remanded for a new trial.

It is therefore ordered, adjudged and decreed, that the judgement of the district court be annulled, avoided and reversed, that the cause be remanded for a new trial, and that the appellee pay the costs of appeal.

Bullard & Holkam for the plaintiff, *Rost* for the defendant.

MARTIN vs. CURTIS & AL.West'n District,
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APPEAL from the court of the sixth district.

MARTIN

vs.

CURTIS & AL.**MARTIN, J.** delivered the opinion of the court.

The plaintiff claims certain slaves in the possession of the defendants. They pleaded the general issue, prescription and title under Benson, whom they called in warranty.

The acknowledgments of the vendor in the deed of sale, are evidence against a subsequent vendee.

Benson alleged that the plaintiff never had possession of the slaves under the sale from Wallace, by virtue of which he claims them—that he released all his right to Wallace, who sold the slaves to him, and that he and his vendee, the defendants, have possessed them upwards of five years—that Wallace's sale to the plaintiff was a simulated one.

The plaintiff had a verdict and judgment, and the defendants appealed.

The documents produced are,

1. Wallace's sale of the slave sued for, to the plaintiff, March 21, 1817.

2. Benson's to the defendants, Nov. 30, 1818.

3. Wallace's sale to Benson, July 3, 1818.

The sale of Wallace to the plaintiff, is a *vente à remere*, a sale with a clause reserving to the vendee the power of redeeming.

That of Wallace's to Benson recites that of

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Wallace to the plaintiff, and Benson promises to procure the plaintiff's release and re-conveyance.

Our attention is first directed to a bill of exceptions taken by the defendants' counsel to the refusal of the district judge to charge the jury, that "in law, the acknowledgment in the conveyance from Wallace to the plaintiff, that the price of the negroes was paid down, was no proof against Benson that such a payment was made."

We think the district judge was correct. Benson was Wallace's vendee, and must be bound by the acts of his vendor, in regard to the thing sold.

The first plea of the defendant, the general issue, is unsupported. The plaintiff proves his right, by the production of the deed of sale of Wallace, under which the defendants claim. This deed is a notarial one, and the identity of the slaves is admitted in the statement of facts.

The plea of prescription, i. e. that the defendants possessed five years, is unsupported—their title bears date Nov. 30, 1818, and the citation in the present suit appears to have been served on the 6th of November, 1823.

The deed of Benson is posterior to that of

the plaintiff, and recites the conveyance of his vendor (of the negroes sold,) to the plaintiff, and he accepts the sale on the covenant of his vendor to produce a conveyance or release from the plaintiff. This does not appear to have ever been obtained.

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Benson pleads, 1. That the plaintiff never had possession of the slaves sold. The plaintiff's deed expressly sets forth that the slaves were *delivered* to him. The statute provides that the tradition or delivery of slaves takes place by the mere consent of the parties, when the sale mentions that the things were delivered to the buyer. *C. Code*, 350, art. 28. It therefore follows, that the plaintiff had that tradition or delivery, which transferred the vendor's right.

Benson, who when he purchased the slaves from Wallace, was informed by a clause in his deed, that the negroes he was purchasing were already sold to the plaintiff, and was willing to trust Wallace on his covenant that he would procure the plaintiff's re-conveyance or release, cannot complain that the plaintiff, by permitting Wallace to possess and have the slaves as his own, enabled him to defraud and impose upon him the second vendee; for the

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declaration of Wallace, contained in the sale to Benson, that the title to the slaves was in the plaintiff, precludes the idea of his exercising any fraud or imposition.

The statement of facts shews that the plaintiff permitted Wallace to keep the negroes after the sale. The evidence of fraud which this complaisance presents, if it could be invoked by Benson, who bought with his eyes open, and to whom every thing was disclosed, must vanish, when the perusal of Wallace's deed to the plaintiff shews that, although the former was secured by an *actual bona fide sale*, yet the intention of vendor and vendee was that the slaves should be re-conveyed, as soon as the former availed himself of the right of redemption, reserved to him by a clause in the deed.

Admitting that to a purchaser without notice, the circumstance, that after the sale was completed, by a *legal tradition*, the vendor was permitted to retain the slaves, and remain the ostensible owner, might give some claim to a party, deceived thereby—yet Benson, who had legal notice by the notarial, sale to the plaintiff, and to whose immediate predecessor notice and knowledge were given by Wallace, cannot possibly complain.

Benson's deed is not such a title as may enable him to prescribe under it, for he knew his vendor had no title.

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There is no evidence of the alleged simulation.

The case, of *Price vs. Curtis & al.* 6 *Martin*, 420, and *Copelly vs. Duverges*, 11 *id.* 641, have been insisted on. But in the first, the deed of sale did not state *any delivery*—and the latter was that of a sale anterior to the code—the conveyance was of land, not of slaves.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Thomas for the plaintiff, *Bullard* for the defendants.

HUNTER vs. SMITH.

APPEAL from the court of the sixth district.

Answers to interrogatories
cannot be divided.

ORTE, J. delivered the opinion of the court. The questions at issue in this suit require the examination and settlement of intricate accounts. The cause is presented to us in such a shape, that we are unable to act on it with

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the confidence of doing justice between the parties; it must therefore be remanded. The plaintiff had judgment in the court below for \$1173 92 cents. Admitting the item of the two notes to be established, the balance due was not correctly struck, according to the evidence before us, for no credit is allowed for the payment of 613 dollars; sworn to in the defendant's answer to the interrogatories. The judge considered he had a right to separate the different parts of the answer, but in this he clearly erred—the whole must be taken together. *C. Code*, 316, art. 264, 11 *Martin*, 217, 1 *Martin*, 534, *Pothier des ob.* 827, p. 2, lib. 3, §7, no. 285.

It is therefore ordered adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, that the cause be remanded for a new trial, and that the appellee pay the costs of the appeal.

Thomas for the plaintiff, *Baldwin* for the defendant.

WRINKLE vs. TYLER.

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TYLER.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court.

The plaintiff claims a balance due on the defendant's promissory note, with conventional interest; and prays for the sale of a tract of land mortgaged therefor.

A vendee cannot resist payment on the ground that there are other persons who have titles to the land sold him.

The defendant resists the plaintiff's demand, on an allegation of the failure of the consideration of the contract, on which the note was given.

The plaintiff had judgment, and the defendant appealed.

The note sued on, was proven by one of its subscribing witnesses.

The case presents two questions:

The first is, in relation to a claim for conventional interest, after the first instalment due, on the land for which the note here sued on was given. The defendant wrote the plaintiff, that he would pay ten per cent. interest on all defalcations, and begged indulgence. This promise we understand with the district judge, referred to the note then due, and not that on which this action is brought, and which did not become payable until several months after.

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The second is a demand for a deduction in the price, by a failure of the consideration. It is proved that the defendant is in possession of the whole tract sold him. There is no means furnished by the evidence to enable us to try whether the titles which he sets up against his vendor are better than that which he holds. No suit has been commenced against him. We do not know that the person in whom these adverse titles are vested, will ever disturb him.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Scott for the plaintiff, *Thomas* for the defendant.

BIRD vs. BOWIE.

If the answers to interrogatories are evasive, the cause will be remanded.

APPEAL from the court of the seventh district.

PORTER, J. delivered the opinion of the court. This action is brought on a promissory note, dated the 18th July, 1820, by which the defendant bound himself *in solido*, with one Resin

Bowie to pay the plaintiff, four months after West'n District,
date, the sum of twelve hundred dollars. Sept. 1824.

The answer contains a general denial, a plea of payment, an allegation of a *dation en paiement* by the co-obligor, Rezin Bowie, of a negro man, valued at twelve hundred dollars, and an averment, that the said Rezin also delivered to the plaintiff a negro called Daniel to labour for the interest of the money.

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To the answer were annexed several interrogatories, the sufficiency of the answers to which forms the principal question discussed by the counsel of the respective parties.

The first was: Did you not receive a negro man named Joe, from Rezin Bowie?

To which the plaintiff answered "he did." The second was: Did you not agree to give him \$1200 for said negro, *and if not, what did you give, or agree to give?*

The answer to this interrogatoy was "No."

The third question was: Was not the amount given, or to be given, to be applied as a payment to said note?

To which the plaintiff replied "No."

The fourth was: Did you give any other consideration for said negro than that above-mentioned, and if so, what was it?

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To which there was the following answer:
"That the negro was conveyed to him for and in consideration of the interest on the amount of the note, given for cash lent, and not in payment, or part payment of said note."

The fifth and sixth interrogatories relate to the last plea, of a delivery of the negro Daniel to laubor, for the interest; and are answered in the negative.

The defendant excepted to the answers to the second and fourth interrogatories, and the judge having overruled them, the correctness of his decision has been brought before us in the usual way.

The defendant propounded two questions to the plaintiff: Whether he had not received the negro mentioned in the first interrogatory; at \$1200, or if not, at what sum had he agreed to take him? The answer furnished a reply to only one of these questions, namely: that he had not received him at \$1200. In this it was clearly defective, but the plaintiff contends this defect has been cured by an answer given to another of the interrogatories, by which it is stated that the negro was not delivered in payment of the principal sum due, but the interest which had accrued on it. And he insists

the amount was immaterial, because it could not be used in this action as a defence, or if material, that the answer is sufficiently explicit, because it states it was the amount of the interest due at the time the slave was received.

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In this reasoning, which is sufficiently ingenious, this court cannot concur. It seems to us to take for granted in favor of the party answering, the very thing which it was the object of the interrogatory to disprove. From the pleadings, and the drift of the plaintiff's answers to the questions proposed to him, it appears that one of the points principally disputed between the parties, was, whether the negro had been given in payment of the principal sum due by the obligation, or in discharge of some subsequent engagement entered into with regard to interest. Now negativing the fact that it was given *in payment*, did not justify an evasion of the interrogatory, which called on him to state at what amount the slave was delivered. To ascertain the truth in regard to the point at issue, the sum at which the negro was received, was very material. It might have shewn so high a price, as to have rendered it improbable he was given as a compensation for the delay in the payment of the origi-

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nal debt, or if given on that account, that the contract was usurious. When the party interrogated fails to answer according to law, it lies on him to shew, that the information he has disclosed to other questions, fully and satisfactorily cures the defect, and places the opposite party in the same situation, that a categorical reply to the interrogatory propounded would have put him. One of the best means of getting verity from reluctant witnesses, and arriving at a correct knowledge of the matters on which they testify, is, by minute interrogation on particulars. A party in a suit who wishes to probe the conscience of his adversary, has the same right, and perhaps a greater necessity, for applying this test, than when examining a witness who is presumed indifferent. The answer excepted to in this instance, is liable to all the objections that a regard to this rule can suggest. It evades particulars, and endeavors to cure the evasion by a general answer to another question, which answer can only be a reply to this, on the supposition that the plaintiff could have answered the particular interrogation, in such a way as would have produced the same result.

The exception made to the reply to the

fourth interrogatory does not appear to be supported. The question was general as to the consideration, and the answer fully meets and satisfies it.

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It is is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that this case be remanded for a new trial, with direction to the district judge to ascertain the exception filed by the defendant to the plaintiff's answer to the second interrogatory. And it is further ordered, adjudged and decreed, that the appellee pay the costs of this appeal.

Scott for the plaintiff, *Oakley* for the defendant.

WARE vs. INNIS.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. This suit is brought by the plaintiff, to recover a part of his wages, as overseer of the defendant, for the year 1822, and also money alleged to have been paid and advanced by him for the use, and benefit of the latter.

It is only by a taking with force, that the owner of a thing loses his right to it.

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KENIS.

The answer contains a general denial of all the allegations of the petition, a plea of prescription as to part of the plaintiff's claims; a forfeiture of his right to recover, on account of having seized and taken property from the defendant, to satisfy the amount now claimed by him, and also compensation to the amount of \$52, &c. Judgment was rendered in favor of the plaintiff, in the court below, for \$568 58 cents—from which the defendant appealed.

From an attentive examination of the evidence of the case, we are of opinion that the facts proven, do justify the decision of the district court, as to its amount.

But an important legal question remains to be settled: Has the appellee forfeited his right to recover, by the seizure of the property of the appellant, (without judicial authority,) to satisfy his claims?

The laws relied on by the counsel for the defendant in support of the plea of forfeiture, are found in the 4 book, tit. 13, & lan. 1, of the *N. Recopilacion*, and the 10 law of book 5, tit. 17 of the same work.

We have attentively considered these laws, and are of opinion that the forfeiture which they create, only takes place in consequence

of a taking with force, as it is believed the intention of the legislature was to prevent breaches of the peace, &c. In the present case there is no evidence of force on the part of the plaintiff.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Thomas for the plaintiff, *Scott & Bullard* for the defendant.

INNIS vs. KEMPER.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The petition states, that the police jury of the parish of Rapides, appointed the defendant and others, a jury of free-holders, to lay out a public road from the Bayou Rapides to the corner line of the defendant's plantation, and thence to the bayou again—that by the report of said jury, it appears they directed the road to run through a part of the plaintiff's land, assessing his damages at \$20 per arpent, without stating the number of arpens, or otherwise as-

A freeholder who has signed a return for a road under the jurat of the justice of the peace cannot be afterwards permitted to prove he was not sworn.

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certaining the amount of his claim, for which reason, and because the said road ought not to have been so laid out, he prayed an appeal from the decision of the jury. He alleges the free-holders were not sworn as the law directs—that the persons named by the jury of police were not all free-holders—that the police jury have appointed the defendant syndic and overseer of said road, who has notified the plaintiff's overseer to send the plaintiff's hands to work on said road—whereupon the plaintiff obtained an injunction, prohibiting the defendant from proceeding to lay out said road, till after the decision of the court on the plaintiff's appeal. There was also a prayer for further redress.

The answer denied all the allegations of the petition, and averred the road to be a proper and useful one.

The district court fixed the width of the road at 25 feet, and allowed the plaintiff \$100 for the value of his land covered by the road, and ordered the injunction to be *ipso facto* dissolved on the payment or deposit of said sum in the office of the parish judge, for the plaintiff, and ordered the parish to pay costs.

The plaintiff appealed.

The statement of facts shews that,

Baillo deposed he does not know exactly how the land runs—but the road cuts part of the back land. He would not be bound to keep up the same for \$500. There are thirty arpens from the bayou to the river, and there is a lane between the plaintiff's and Kemper's land that has been used. No part of the lane belongs to the plaintiff. The plaintiff has a road from his gate to the river, through the middle of his field. The witness is the plaintiff's attorney in fact.

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KEMPER.

Compton deposed, he thinks the damages could not be less than \$300. He would not keep up the two fences for that sum; but knows nothing of the place.

M'Cummin deposed that the road cuts off about 30 arpens, more or less. The road is about 14 arpens. A road along the plaintiff's line would be impracticable, without a bridge as large as that over the bayou. The road laid out is as good as can be. By going round Innis' line it would not be lengthened a quarter of a mile, the plaintiff's line is about twenty-three arpen's long.

On the part of the defendant,

Wood deposed there was a road from Kemper's to Curtis'—where Curtis and the witness

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hauled their cotton. The road was more injurious to the plaintiff than the present. The road is well laid out, on the best ground. The land is worth \$20 the arpent. That on the side line is worth \$20.

Johnson deposed the plaintiff never applied to him for his indemnity. He is the parish treasurer.

Martin deposed the road has been between the plaintiff and Kemper ever since he recollects. There was a road, called the old French road, that went farther into the plaintiff's land, which he recollects for nearly thirty years that he has been here. The plaintiff said, that if the witness would give half of the land, he would give his quantity. The road is as useful to the plaintiff, as to the witness. The defendant commenced opening the road, but was stopped by the injunction. It is the best road that can be had, and shortens the way to the Indian village very much, and adds a great deal to the value of the plantation.

During the trial, the plaintiff offered Sacket, one of the jury of freeholders mentioned in the petition, to prove they did not take the oath, required by the act of 1818, previous to their laying out the road—but the court refused to

hear him, as his deposition was offered in contradiction of the report of the freeholders. The plaintiff's counsel took a bill of exceptions.

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The return of the freeholders, subscribed by Sackett, the witness produced, shews they took the oath, and after the signatures of the freeholders, is the *jurat* of the justice of the peace. This establishes that the oath *was* taken—but it is urged this does not *shew* it was taken before they proceeded. This circumstance would not vitiate the proceedings. *Nott vs. Daunoy*, vol. 1, 1.

On the merits, the judgment does not appear erroneous. Nothing in the evidence enables us to say the road was improperly laid out where it is. The freeholders assessed damages to the value of the land taken—they did not consider any claim to indemnity on the score of any extra fencing, which the road might render necessary. But the plaintiff himself informs us of his grounds of complaint—of the reasons for which he appealed, viz: that the road was improperly laid out where it is—that the freeholders had stated the rate of compensation at \$20 per arpent, without either calculating the amount, or stating the *number* of arpens. This number appears now—the judg-

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ment fixes the width of the road at twenty-five feet. Indeed this was already fixed by law; and we have the length of the road—this enabled the district judge to calculate the *quantum* of the compensation.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Bullard & Scott for the plaintiff, *Johnston* for the defendant.

STAFFORD vs. CALLIHAM.

APPEAL from the court of the sixth district.

A new trial will not be granted, if the party applying for it has not used due diligence to procure the necessary evidence.

MARTIN, J. delivered the opinion of the court. The plaintiff states that in 1817, he delivered to the defendant one hundred barrels of corn, for which he promised to return him one hundred and twenty in 1819; that the defendant received 39,000 pounds of seed cotton, to be ginned and baled; that by the ill management of the defendant, the said cotton was greatly injured, and he refuses to deliver said cotton or to pay the price of the corn.

The defendant pleaded the general issue. West'n District.
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There was judgment for the plaintiff.

The defendant appealed.

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vs.
CALLIHAM.
The statement of facts shews that the clerk of the district court deposed the original petition and answer are lost, and upon the most diligent search are not to be found.

Hall deposed he saw in the plaintiff's hands a receipt of the defendant for 30,000 pounds of cotton; as well as he recollects; it was what is called a gin receipt; the defendant was the near neighbor of the plaintiff, and his gin was the most convenient to the latter. The deponent is the plaintiff's brother in law.

Cheney deposes he recollected taking the plaintiff's crop to the river; it came from the defendant's gin; it was delivered him at Cheneyville by King. In 1819, he paid \$1 50 per barrel for corn. In the spring, corn was very high, but he has no knowledge of the price.

Simmons deposed he got 40 barrels of corn from the plaintiff for the defendant in 1817. He went into the field and gathered it.

Cheney deposed there was an understanding the corn should be returned in March, 1819, with twenty per cent. In the fall of 1818, the defendant bought from Levy Stafford, corn at \$1 50, which he was to pay the plaintiff.

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Simmons deposed he was overseer to the defendant's gin. There were 30;000 pounds of cotton. He delivered 12 bales to *Sutton* and 8 to *Bacon*. The defendant by his gin and crop made 30 bales. The above 20 bales were delivered to the plaintiff's order; they averaged 400 pounds; the press made bad bales and the gin none of the best: 3 bales which were for *King* were upset in the bayou. The plaintiff refused to receive some, or the whole of the cotton that was to be delivered to *Sutton*. Some were repressed, and he heard that the defendant had promised to repress some of the bales objected to.

Hennyman said he paid in the winter of 1818, and fall of 1819, 6 1-2 and 7 cents for cotton in the seed. Cotton sold lower in the summer of 1819 than in the spring. He purchased 100 bales and lost \$4000: the average price was 20 cents.

King deposed the plaintiff gave an order for 12 bales and 6 were received: it is generally supposed that 400 pounds of seed cotton give one hundred of clean.

Lackie deposed he received 3 bales of cotton from the plaintiff, which were sold by *Beatty*: in the fall of 1819, cotton was 19 cents.

Bryan went to the defendant's gin to receive the cotton, six bales of which were shipped by King in the spring of 1819; three were turned overboard: he received 9 and turned over 3: he left these on the bank: the cotton was in bad order: the bagging and ropes rotting off: seed from the gin had washed under it and was growing into it.

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Simmons deposes, Sutton took none of the plaintiff's cotton from the gin, but he rolled it out.

Sutton deposed he bought from the plaintiff 12 or 14 bales of cotton, but did not receive it: it was not put up in a mercantile manner: he went with the plaintiff to the defendant's gin it, but the plaintiff declined receiving it, as it was in bad order. The defendant promised to repress some of the bales: the gin made bad cotton: when he came to weigh it, he found the bales on poles: they were not touching the ground and were covered with boards: they were protected from the weather, except from beating rain: the cotton was not trashy, but stained.

An application for a new trial was made on the affidavit of Howard.

He deposed he is the son-in-law of the de-

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fendant, who is now absent from the state, since September last. In his absence the deponent attends to his business. The cause being continued at the last term, the petition and answer were lost. In the beginning of the present term nothing was done in the suit, and the deponent believing nothing would be done, went hence. On the second week of the term he understood the plaintiff was taking his witnesses to court; whereupon he attended, with a witness, by whom he expected to prove the delivery of the whole cotton of the plaintiff, but was disappointed: that since the trial, the deponent, in a conversation with Leroy Stafford, has discovered that the said Leroy and Paul G. McNeely received the whole of the cotton which was not, at the trial, proven to have been delivered to others: that the whole of the plaintiff's, or a considerable portion of it, was in very bad order, and much damaged, when sent to the defendant's gin: that he did not know either of these circumstances before trial, nor could he, by using ordinary diligence, have discovered them: that the affidavit is not made, &c.

It does not appear to us the district judge erred in denying a new trial. There was no

due diligence used (if the facts alledged be true) in ascertaining what quantity of cotton could be proved to have been delivered. It is not sworn that the defendant himself, who went away shortly before the trial, was ignorant of the person to whom the cotton was delivered, indeed he could not well be.

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vs.
CALLIHAM.

On the merits we see no reason to think the court erred.

It is therefore, adjudged and decreed that the judgment of the district court be affirmed with costs.

Thomas for the plaintiff, *Baldwin* for the defendant.

BACON vs. McNUTT & AL.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiff, as widow and tutrix of her minor children, demands from the defendant, surety of W. Murray, the price of a lot in the town of Alexandria, purchased by the latter, at the sale of her husband's estate.

If a probate sale be made to satisfy a mortgage and the mortgagee become the purchaser he will be allowed to retain the price.

The defendant pleaded the general issue—

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a mortgage on the lot and confession of judgment in favor of his principal—a compensation of a claim of the latter against the estate, and a plea of discussion.

Murray interpleaded—denied all allegations—averred the claim was extinguished by compensation or payment—prayed the defendant being a foreigner should give surety, if any thing was recovered, as other persons were interested in the estate.

There was judgment against both principal and surety; but execution was directed not to issue, till the plaintiff gave surety to indemnify the defendants against an hypothecary claim of Ferguson & Rich, and not against the surety till after the discussion of the property of the principal pointed out by the surety.

The plaintiff appealed.

The documents that come up are process verbal of the sale of E. Bacon's estate. The petition to, and order of the parish judge, the receipt of Murray, vendor of E. Bacon, for a partial payment.

The defendants introduced the record of a suit, Ferguson & Rich vs. Bacon, the present plaintiff, and the subrogation of Murray to the plaintiffs' rights.

Scott deposed that the note, offered in compensation, is one of those given in payment of the lot, as well as that filed in the suit of Ferguson *vs.* Rich, both being secured by a mortgage on the lot.


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It is urged that Murray purchased at a sale, ordered by the court of probates, for the purpose of reducing the property of the estate into cash, so that the debts might be paid out of the proceeds, according to their respective classes; and that therefore there cannot be any compensation allowed, and the district court erred in allowing any.

This does not appear to have been a sale of the *whole* property of the estate, but the sale of *a lot*, and the avowed object, not to reduce it into money to be distributed, but to sell on credit so as to get a higher price and the sale is only authorised, as prayed for, to avert the loss to the estate and perhaps to the mortgagee, that would result from a *cash* sale. It is not even averred that there are *other* debts, and it is that there is *other property*. The district court did not err in considering the sale as made for a *particular* object, that of satisfying the mortgage on the premises. If so nothing is more just than to allow the mortgage creditor, who

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has become a purchaser to retain in his hand, the produce of a sale, actually made to pay him. It appears that Murray, in his own right and as subrogated to those of Ferguson and Rich, is the only hypothecary creditor. The judge therefore acted correctly in allowing his claim for compensation.

It is therefore ordered, adjudged and decreed that the judgment be affirmed with costs.

Wilson for the plaintiff, *Bullard & Scott* for the defendant.

TAYLOR vs. CURTIS.

APPEAL from the court of the sixth district.

A man's solvency cannot be better tested than by the return of an execution against him, on which no property can be found.

PORTER, J. delivered the opinion of the court. The defendant transferred to the plaintiff, part of a judgment, which he had recovered against one A. J. Davis, with an express warranty of his solvency; the money not being made on execution, this action has been brought against the defendant as transferror and the only question presented for decision is whether it has been shown that Davis was insolvent.

The transfer bears date the 22d. November, 1822. On the 17th January, 1823 the plaintiff issued execution against Davis on the judgment, and on this execution only sixty dollars could be made which the defendant received. On the 22d of the month last mentioned, Davis presented his bilan and prayed for a meeting of his creditors in order that he might make them a cession of his goods: and shortly after died.

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CURTIS.

In addition to this evidence, parol testimony was introduced to shew that Davis was insolvent, and that every thing he had was mortgaged for other debts.

We think the plaintiff is entitled to recover. The defendant, in warranting the solvency of Davis, warranted his ability to pay, and this ability could not have been better tested, than by the application of an execution, which proved unavailing. The defendant has contended that Davis was not insolvent, because the schedule filed by him shews that he had property and debts to a larger amount than that which he owed. There are few insolvent debtors, who do not present such statements, and there are few of those statements that do not prove delusive; but whether that relied on

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—
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vs.
CURTIS.

here, would have been an exception to the general rule, we deem immaterial in settling the present question. It was not the understanding of the parties, nor is it our understanding of the law, on such a contract as this, that the transferee is to await the settlement of an insolvent's estate, before he can have recourse on his transferror. The evident meaning of the agreement was, that Davis was able to pay the debt in due course of law, and that the means of compelling him should have been resorted to. The obligations of sureties, who contract in the ordinary way, furnish a fair analogy for ascertaining the right of the parties, now before us. They, like the defendant, agree that the person, for whom they bind themselves, is solvent, and that he will pay the debts he has contracted, and they can require his property should be discussed, before recourse is had on them; but they cannot compel the creditor to do so, when that property is in litigation, or the debtor has sued to make a cession of his goods. On the whole, we think, that the plaintiff, on his failing to make the money out of the debtor by due course of law, had a right to sue the defendant on his warranty,

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, that the plaintiff do receive of the defendant \$700, with interest thereon, at 5 per cent. from the 25th of November, 1822 until paid, and costs of suit in both courts.

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Sept. 1824.

TAYLOR
vs.
CURTIS.

Bullard for the the plaintiff, *Thomas* for the defendant.

WATERS vs. WILSON & AL.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court.

The petition states that the estate of the late James H. Gordon was indebted to the plaintiff, in the sum of \$869 71 cents: that this debt has been classified by the judge of probates of the parish of Rapides as a privileged debt: that notwithstanding this classification, the defendants, though often requested, have refused to pay the same. It concludes by praying for citation, and judgment for the amount ascertained, and settled by the court of probates.

A curator, or beneficiary heir, ordered by the court of probates to pay a debt, may be sued in the district court.

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vs.

WILSON & AL.

The answer contains a plea of payment, and the general issue. Judgment was given in the district court against the defendants in their personal capacity, and they have appealed.

In this court the appellants have assigned for error, that the district court had not jurisdiction of the case: and that this jurisdiction being a want of power in relation to the subject matter, may be shewn at any time before final judgment.

The appellees insist that the exclusive jurisdiction of the court of probates, only relates to the examination and classification of the different claims against the estate; and that these objects once obtained, an action can be maintained before any of the ordinary tribunals, to recover the amount due.

The provisions in our civil code, in relation to the settlement of estates, administered by curators, or beneficiary heirs, seem altogether to proceed, on the apprehension, that the curator would pay too soon, and that the absent creditors would be injured: for there is not a single provision in it, which provides the means of quickening the representative, in the discharge of his duties, by compelling him to publish the account of the classification, and

place the estate in a situation for discharging its debts: Nor any which speaks of, or indicates, the form of execution that should issue against him. In practice, however, we believe it has been customary for the court of probates, after classification of the debts, to order the curator to pay them. The judge, in the instance before us, acted on this idea; for we find in the record, that he ordered the defendant to pay the debts which were classed, *out of the funds in hand*; and the correctness of this order cannot be enquired into now, for no appeal was taken from it. Under a late act of the legislature he has the power to enforce such decrees; for it declares, in express terms, "that the court of probates shall have power to issue *all writs and mandates* as may be necessary for the execution of its orders, judgments, and decrees." *Acts of the legislature, 1820—96 sect. 9.*

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vs.
WILSON & AL.

Had, therefore, this suit been brought since the passage of the act referred to, we should be strongly inclined to believe it could not be maintained. But it is not that question, but another, which is now before us; and that is, whether antecedent to the passage of this law, a curator, or beneficiary heir, who failed to comply with an order to pay the creditors, after classi-

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vs.
WILSON & AL.

lication, could be compelled to do so by an ordinary suit. For the solution of the question, it becomes necessary to look into the situation of the estate at the time the order was given, and what were the powers of the court in relation to it. By law, the whole estate is directed to be sold, and the proceeds are presumed to be in the hands of the administrator. No execution, therefore, could issue against the property of the succession, and the only means which the court of probates could have used, would have been some written process, which might have compelled the representative of the estate to discharge the personal responsibility he had incurred.

Now, previous to the passage of the act already referred to, it does not appear to us that such means were placed within the reach of that tribunal: indeed the very enactments there made on the subject matter, must have proceeded on the idea that such powers were not possessed by the court of probates, and that it was necessary to confer them. What then was the consequence of the probate court wanting means to enforce its orders? That the curator or beneficiary heir could retain the funds, he was ordered to pay over to others so

long as he pleased. We think not. We consider his failure to comply with an order given against him in his *representative capacity*, created a cause of action which made him responsible in his *personal*; and that the action might be prosecuted either by a suit on his bond, or by setting out the particular sum due as in the present instance.

None of the means of defence set up in the answer have been sustained by proof, and we discover no error in the judgment except a small one in calculation; and the circumstance of the decree being against husband and wife. We see no evidence which makes him responsible for any act done in relation to the estate, and he is certainly not bound to pay the debts contracted by his wife before coverture.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and proceeding to give such judgment as should have been rendered there, it is ordered adjudged and decreed that the plaintiff do recover of the defendant Maria C. Wilson, the sum of \$434 21 cents, with interest from judicial demand

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West'n District, until paid, and costs in the court below, the
 Sept. 1824. appellee paying costs in this.

WATERS
 vs.
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Baldwin for the plaintiff, *Wilson* for the de-
 fendant.

TRUSTEES OF NACHITOCHES vs. COE.

APPEAL from the court of the sixth district.

The district
 court has juris-
 diction of suits
 for the removal
 of a nuisance,
 although the
 corporation of
 the town may
 remove it,

PORTER, J. delivered the opinion of the
 court. This is an action brought by the cor-
 poration of the town of Natchitoches to have
 a house, built by the defendant on the bank of
 Red River, within the limits of said town, remo-
 ved, as being a nuisance. Two questions have
 been raised: the first as to the jurisdiction of
 the court; the second as to the merits.

On the first point it has been contended that
 by acts of the legislature, passed in the years
 1819 and 1820, the corporation has been in-
 vested with all the powers of a police jury, in
 relation to roads, streets and the banks of ri-
 vers; and that the conferring of these powers,
 gave to the body to whom they were granted
 the right of enforcing any regulation they

might make, and removing all nuisances. Taking it for granted that such powers have been vested in the corporation, it does not follow that the district court was ousted of its jurisdiction. No ordinance of the trustees has been produced by which means have been provided for hearing and determining cases of this kind; and the appellant certainly complains with a bad grace, that his adversary is not judge as well as party.

As it regards the merits, but few observations are necessary to shew the correctness of the judgment of the court below. The evidence proves that the house, which the corporation by this action endeavor to remove, is placed directly on the bank of a navigable river, and that it interrupts that use of it, which is common to all men. *Partida*, 3, 28, 7: *Curia Philipica*, lib. 3, cap. 1, no 16.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Morris & Bullard for the plaintiffs, *Rost* for the defendants.

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Sept. 1854.

TRUSTEES
NATCHITO-
CHES.
VS.

COR.

West'n District,
Sept. 1824.

DAVIS vs. CURTIS.

DAVIS
vs.
CURTIS.

If there be no
bond given on
the appeal, it
will be dismiss-
ed.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The appellee moves to dismiss this appeal because no bond has been filed for the costs. The obligation which is in the record and which was perhaps executed for that purpose, appears to have a reference to another suit, and is no security in this.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed with costs.

Thomas for the plaintiff, Baldwin for the defendant.

CRAWFORD vs. CHENEY.

In a suit for
killing a slave,
presumptive
evidence sup-
ports the ver-
dict.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. This is an action brought to recover the price of a negro whom the plaintiff charges the defendant with having shot and killed.— The evidence on which the jury found a verdict comes up on the record, and the defendant renews here a motion which he unsuc-

cessfully made in the court below for a new trial, on the ground of the finding being contrary to law and evidence. The testimony it has been argued is weak, and it is perhaps so, but the act charged here, is one rarely committed in presence of witnesses, and the most that can be expected in cases of this kind is the presumptions that result from circumstances. A most respectable jury, who knew the parties, have found a verdict in favor of the plaintiff, and we are unable to say the evidence authorises us to reverse the judgment rendered therein. We believe justice has been done, and when the proceedings of the inferior court terminate there, as we think they have in the instance before us, a stronger case than this must be presented, to induce us to send the cause to a new trial.

West'n District,
Sept. 1884.

CRAWFORD
J.
CHENEY.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Scott for the plaintiff, Baldwin & Johnston for the defendant.

West'n District,
Sept. 1824.

CRAIN
vs.
ROBERT.

If the defendant's plea be not supported by evidence, and he appeals, damages will be given against him.

CRAIN vs. ROBERT.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. This is an action founded on a promissory note, the payment of which is secured by mortgage on certain property, as set forth in the plaintiff's petition. The answer of the defendant admits the execution of the note, and pleads in avoidance a failure of the consideration for which it was given.

The plaintiff obtained judgment for the amount by him claimed, and the defendant appealed.

The record contains no evidence in support of the appellant's pleas. The appeal is bro't up by the appellee, who claims damages on account of its having been taken for the sake of delay, &c. We have been unable to discover any thing in the case, which induces us to believe that it was taken for any other consideration.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with ten per cent. damages on the amount thereof, and that the appellant pay costs in both courts.

*SAME vs. SAME.*West'n District,
Sept. 1824.

APPEAL from the court of the sixth district.


 CRAIN
 vs.
 ROBERT.

MATHEWS, J. delivered the opinion of the court.

This suit is similar on the part of the plaintiff, to the former, being on another note of hand executed by the defendant, in consequence of the same contract which gave rise to the former, &c. The answer contains a plea of want of consideration, by a failure on the part of the plaintiff to deliver articles, of which the note evidenced the price, to the value of three hundred dollars and upwards. It also contains a plea of payment to the amount of six hundred dollars, alleged to have been made to the plaintiff by a draft or bill of exchange on Debays & Longer, of New-Orleans, drawn in his favor. As to the claim of a deduction from the amount due on the note, as declared on by the plaintiff, in consequence of his failure to deliver the articles designated in the answer, the testimony is so vague and uncertain, both as to the things and their value, that the court below seems not to have taken this part of the case into consideration, in giving judgment. The great want of certainty in relation to this part of the defence, justifies its being disregarded;

A claim supported by vague proof will be disregarded. Novation is never presumed.

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Sept. 1824.

GRAIN
vs.
ROBERT.

considering that it will be no bar to a suit hereafter, to insure a delivery of said articles, or recover their value, should it appear that they are embraced by the contract of sale.

The second ground of defence assumed by the appellant, requires more consideration.— The evidence shews that the amount of the bill on D. & L. was to have been credited on the defendant's note, when it should be recovered by the plaintiff, &c. We can imagine only three ways, in either of which the defendant would be entitled to this credit. First, by actual receipt of the money on the bill. Second, by novation; or, third, by such negligence on the part of the plaintiff, as, according to commercial laws and usages, would have exonerated the drawer from all liability on his contract of exchange. Now the record contains no evidence that the plaintiff has recovered the sum called for in the draft. The manner in which he took it does not operate a novation, which is never to be presumed, &c. See *C. Code*, 296, art. 174. The kind of novation which might have been effected in the manner insisted on by the defendant, is that of delegation, and does not take place unless the creditor *expressly* declares that he intends to dis-

charge his debtor. See same authority, same West'n District. page and art. 176. Sept. 1824.

But it is believed that notwithstanding this rule of our code, in commercial transactions relating to promissory notes and bills of exchange, the effects of a novation by delegation may be produced by negligence on the part of holders of such instruments, such as want of notice, of non-acceptance or non-payment, to the previous parties.

In the present case there is evidence of an acceptance by Debuys & Langer of the bill in question, as proven by their account current with the defendant, in which it is charged to him. It is not shewn that he ever received notice of non-payment. But the plaintiff insists that he is excusable for this neglect, on the ground that the drawer had no funds in the hands of the drawees, as appears by the same account current, which shews the acceptance. This is true; and according to the law merchant, will excuse neglect of notice to a drawer. The bill has not been returned to the defendant, or in any manner accounted for. The plaintiff being excused for want of notice, might resort to the drawer in consequence of the failure of the acceptors to pay. In relation to

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this danger, it is our duty to afford protection to the appellant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled. And it is further ordered, adjudged and decreed, that the plaintiff and appellee do recover from the defendant and appellant the sum of one thousand dollars, with interest, at the rate of ten per cent. until paid, and that the property mortgaged for the security of the payment of the debt, be seized to satisfy the judgment. And it is further ordered, adjudged and decreed, that no execution shall issue thereon, until the plaintiff produces to the district court the bill of exchange drawn by the defendant in his favor, on Debuys & Longer, or satisfactorily account for the same. And it is further ordered, that the appellee pay the costs of the appeal.

CAMPBELL vs. MILLER.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. This is a suit commenced to recover two negro slaves, described in the plaintiff's petition, to which he claims title. The answer contains a general denial and also a plea of title from a person authorised to sell by the plaintiff, &c. Judgment was given for the defendant, and the plaintiff appealed.

This is the second appeal. The case was remanded for a new trial by a judgment of this court at the last term.

On the last trial a witness was offered to prove the confession of the appellant, that he had authorised the person who sold to the defendant, to sell and convey the slaves in dispute, for and on account of the former. An objection was made to the introduction of this witness on the part of the plaintiff, and being overruled his counsel took a bill of exceptions. Although it may possibly be in conformity with the laws of the state of Mississippi, to pass the title to slaves by verbal sale and delivery, and that a contract of mandate, for the purpose of effecting such sales may be proven by parol, yet

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When the law of the country in which the parties contracted is not set forth, the court must take that of the state, as their rule.

When the cause was tried by a jury below, and the judgment is reversed, it is sent back, although there be sufficient evidence to act on.

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these laws have not been exhibited to the court below or to us, in such a manner as to form the basis of an opinion on this subject.—

We must therefore resort to our own state laws, as the rule of decision on this bill of exceptions. And a simple reference to that part of them, which relates to the transfer of slaves, is sufficient to shew the incompetency of the witness offered in this case. But independent of the direct operation of our rules of evidence; according to the general principles of all laws on that subject, oral evidence ought not to have been permitted to go to the jury after it had been discovered that the power said to have been granted was in writing, and that writing wholly unaccounted for.

The judge erred in admitting this testimony to the jury; and this may not be a good reason for again remanding the cause, as this court might disregard it, and procede to give such judgment as the evidence properly received would authorise, and the justice of the case require.

But we have been in the habit of allowing great weight to the verdict of juries, even when they have been general both as to law and fact, and not confined to facts alone. This conces-

sion of influence is founded in a belief, which we should reluctantly change, that they are what their denomination purport them to be, a representation of truth. If one jury, by improper bias, or any other cause may have mistaken the facts of a case as exhibited by the whole evidence, or in our opinion have given an erroneous verdict, it is our custom to remand the suit for a new trial, in order that another jury may decide the facts.

How far this comity ought to be extended on a repetition of verdicts, contrary to a very great preponderance of evidence, is not required now to be expressed.

The testimony, as it comes up in the record, has been by us attentively examined and carefully weighed, and it does appear scarcely to leave room for a doubt against the claims of the plaintiff.

As one of the parties to this suit has claimed a trial by jury; and as we are unwilling in the slightest degree, to invade the privileges belonging to a trial *per pais*; and as this is the second time which we have so widely differed with the jury in their conclusions on the facts of the case,

It is therefore ordered, adjudged and de-

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creed, that the judgment of the district court be avoided, and that the cause be remanded for a new trial, and that the appellee pay the costs of this appeal.

Thomas & Oakley for the plaintiff, *Baldwin* for the defendant.

CAMPBELL vs. HENDERSON.

APPEAL from the court of the sixth district.

The same
point, as in the
preceding case.

MATHEWS, J. delivered the opinion of the court. This case differs so little from that just decided, that the reasoning of the former may be properly applied to it.

It is therefore ordered that the same judgment be entered.

Thomas & Oakley for the plaintiff, *Baldwin* for the defendant.

HENDERSON, USE OF HUNTER vs. BOWLES.

APPEAL from the court of the sixth district.

A judge needs
not in all cases
refer to the law
which he de-
cides.

PORTER, J. delivered the opinion of the court. This case has been submitted without argument.

On examining the record, we find the action was commenced on a note of hand, the execution of which was clearly established, on the trial in the court below.

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No matter in avoidance was pleaded, and nothing, appearing in evidence, creates the slightest doubt of the justice of the plaintiff's claim. To excuse an appeal taken in so plain a case, the defendant has relied on this court in two points.

First: That no amicable demand was made, and consequently, there was error in giving judgment for the plaintiff *with costs*.

Second: That the judgment refers to no law, and is therefore, unconstitutional and void.

1. An interrogatory is annexed to the petition, calling on the defendant to say whether an amicable demand was not made of him; to this no answer has been made, and the fact, endeavored to be established by it, must be taken as confessed. It is said in the note filed by appellant's counsel in the record, that a denial of this fact by an agent, *though not made on oath*, is sufficient; because the petition was served at the last place of residence of the appellant—a position, so clearly untenable, that any reason-

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vs.
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ing on our part to shew it such, is deemed unnecessary.

2. This point is of the same character as the first, that is wholly unsupported by law. The objection made to the judgment has been more than once taken in this court, and always without success. A judge must, in all cases, give reasons for his judgment, because it is impossible he can conscientiously decide against either party without some, but he is not obliged to cite the particular law, on which his decision is founded: he may be well acquainted with its spirit, meaning and force, and yet not recollect its words, nor the chapter or page in which it is found. Thus the constitution requires judges to refer, as often as possible, to the particular law, but in *all cases*, to adduce the reasons on which their decrees are founded. 10 *Martin*, 162, 4 *id.* 536.

It is ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs, and ten per centum on the amount of said judgment, as damages for the delay occasioned by this appeal.

Thomas for the plaintiff, Oakley for the defendant.

HAM vs. HERRIMAN.West's District,
Sept. 1864.
HAM
vs.
HERRIMAN.**APPEAL from the court of the sixth district.**

PORTER, J. delivered the opinion of the court. The plaintiff sues to set aside a conveyance of certain negroes, which he alleges the defendant's mother made to him, in fraud of her creditors.

The question of fraud is of the peculiar province of the jury.

The general issue is pleaded.

The parties have been already before this court, on the question now at issue, in an action commenced by the defendant to enjoin the plaintiff from levying an execution on the property, which forms the object of the sale, now sought to be annulled. Not finding evidence in the record to support the first verdict, we maintained the injunction, but reserved to the defendant, and now plaintiff, the right of bringing an action to avoid the contract. Vol. 1, 535.

This right he has exercised by the present suit, and the case now comes up with additional evidence, and a second verdict finding the conveyance fraudulent. It appears to us from a close examination of the evidence, that the jury did not err in the conclusion they

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HERRIMAN.

drew from it, nor the court in rendering judgment thereon.

It is therefore adjudged and decreed that the judgment of the district court be affirmed with costs.

Johnson for the plaintiff, *Baldwin* for the defendant.

GRAFTON vs. COLLINS.

If an overseer be discharged for misconduct, he can only recover for the time he served.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. This is a suit by an overseer against his employer. It is founded on articles of agreement entered into between the parties, which are alleged by the plaintiff to have been violated by the defendant, in discharging him without cause, from his service.

The cause was submitted to a jury, in the court below, who found a verdict for the plaintiff, and assessed his damages to the sum of one hundred and twenty-five dollars; judgment was rendered in conformity thereto, and the defendant appealed.

A just decision of this suit depends principally on a fair construction of the agreement

entered into by the parties previous to the time at which the appellee commenced his services as overseer of the appellant's plantation. We have examined this instrument attentively, and also the other evidence of the case, and are clearly of opinion that the defendant was justifiable in dismissing the plaintiff from his employment; and that she is only liable to pay him *pro rata*, of the whole year, for the period of service actually performed.

The defendant pleaded in compensation, an account against the plaintiff, of which the record shews no proof. Neither is there any evidence as to the furnishing, or not furnishing, the provisions stipulated in the written contract.

We are of opinion, that the law and evidence of the case do not support the verdict and judgment of the court below.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled.

And proceeding here to give such judgment as ought in our opinion, to have been given in the court below, it is ordered, adjudged and decreed, that the plaintiff and appellee do recover from the defendant and appellant, the

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sum of seventy-eight dollars and twenty-five cents, and that the appellee pay the costs of this appeal, &c.

Baldwin for the plaintiff, *Thomas* for the defendant.

COX vs. WELLS & AL.

Return of the sheriff, that he served *petition* and *citation*, is sufficient to shew he served it in both languages. It does not vitiate the *venire* that three of the persons drawn cannot be summoned.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court.

This action was commenced on a promissory note, executed by the defendants, in favor of one John Botts, by whom it was regularly endorsed to the plaintiff.

The defendants pleaded in abatement, that a copy of the petition was not served on them in the French language; and this plea being over-ruled, they put in an answer to the merits.

It appears to us the court did not err in the decision made by it on the plea in abatement. The return of the sheriff shews that *he served the petition and citation* on the defendants. It was unnecessary he should state this service was made in both languages, since that fact was implied by the words used in the return; for unless

served in that manner, there was no service, i. e. no legal service. This case cannot be distinguished from that of *Fleming vs. Conrad*, 11 *Martin*, 301.

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The defendants in their answer prayed for a jury, and on the cause being called for trial, they challenged the array, on the ground that only 45 persons had been summoned for the term. The district judge refused to sustain this exception, because it appeared the regular number of 48 had been drawn, and that the failure in summoning three of them, arose from one being dead, and the other two absent from the parish. In this opinion we also concur. The law imperatively requires that forty-eight persons at least, should be drawn and put on the venire, and this injunction must be strictly pursued; for such is the direction of the statute—and there is no impossibility of yielding an obedience to it, nor indeed any difficulty in carrying it into execution. So, too, the forty-eight individuals thus selected, ought and must be summoned, if they can be found within the county; but if they cannot, there is no fault in the officers, and the venire is not vitiated. The construction contended for, would enable any of the persons put on the pannel, who chose to

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abscond or conceal himself, to stop the administration of justice. *Lex neminem cogit ad vana, seu impossibilia.* The legislature, by providing a means for supplying the deficiency thus created, have most clearly intimated, that those of the original venire, who do attend at the term of the court to which they are summoned, are good and lawful jurors. "Where from challenges or otherwise, there shall not be a jury to determine any civil or criminal cause, the sheriff or his deputy shall, by order of the court, when such defect of jurors shall happen, return others, *de talibus circumstantibus*, sufficient to complete the pannel. 2 *Martin's Dig.* 200.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiff, *Oakley* for the defendants.

PRUDHOMME vs. DAWSON & AL.

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vs.

DAWSON & AL.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court.

The plaintiff, wife of D. Cass, but separated in goods and authorised by him, charges she brought in marriage and as her *dot* sundry slaves, part of whom are in the respective possessions of the defendants, and have been so since the year 1810, without either of them having title, and they refuse to return them or account for the hire of them.

Under the Spanish law, valuation in the contract of marriage did not transfer property to the husband.

Prescription does not run against the wife in favour of the purchasers of her property, although separated.

Purchaser is not necessarily in bad faith from the inception of suit,

The defendant Dawson pleaded the general issue, title by purchase and prescription.

The defendant Rachal pleaded title, in himself, that the slaves brought by plaintiff in marriage were estimated in her marriage contract and thus became the husband's absolute property.

There was judgment for the defendants and the plaintiff appealed.

Two questions arise in this case, whether the marriage contract vested the property in the husband? Admitting not, whether the plaintiff's claim is barred by prescription; this last question applies only to the defendant Dawson.

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The contract states that the parties are possessed of property to the value of \$ 3000 each; that all the property of the contracting parties, now in possession or action, shall be put into the husband's hands, to be by him employed for their mutual advantage; and that the said common (mutual) property, with its increase, shall, on the death of the parties, be divided among their common issue, and if there be no such issue, to the heirs of the survivor, or the person, in whose favor he may dispose of the same.

The marriage took place before the promulgation of the civil code. We think it clear that the total value of the property of the parties mentioned in the contract, was intended solely to establish the equality in value of what they brought. The contract speaks of the property they brought, as being *common, mutual*, and managed by the husband for the joint advantage of both.

Under the Spanish law, it was not every valuation which transferred the property of the wife's real estate to the husband. Febrero speaks of valuations, which have not the effect of a sale, *estimacion en que no causa venta*. He says the valuation has this effect when it is held

in such a manner that the dotal effects are given to the husband, as sold at the price they were valued at. *Quando se aprecian de tal suerte, que se entregan al marido como vendedor en que se valuen. Feb. librer. de. es. ch. 2. sect. 1. n. 8 and 9. Part. 4, 11, 20.*

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2. It is true the defendant Dawson would be protected by the plea of prescription, if the plaintiff's marriage had been dissolved at the time of the separation of property: as the marriage still subsists, the wife must be protected, because her action may be prejudicial to her husband. *Civ. Code, 486, art. 14. Sirey 2. 30—17 id. p. 1. 304.*

There is a bill of exceptions taken by the plaintiff's counsel to the opinion, in allowing the plea of the defendant Rachal, that the authorisation of the plaintiff's husband was not filed with the petition. Notwithstanding which the judge permitted her to proceed to trial.

On the objection being taken, the authorisation granted before the inception of the suit was produced. The authorisation was set forth in the petition, and we think that its being produced as soon as called for sufficed. Besides the judge by allowing the plaintiff to proceed to trial, virtually overruled his former

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decision, and no exception was taken to this change of opinion.

We do not think the defendants bound to pay for the hire. They are not necessarily to be considered in bad faith from the inception of the suit. *Civ. Code*, 102, art. 7. The code has wrought a change in the former law, which put an end to the good faith on the judicial demand. *Richardson vs. Packwood*, vol. 1, 405, where the subject is examined at full length.

It is therefore ordered, adjudged and decreed that the judgment be annulled, avoided and reversed, and that the plaintiff recover from the defendants respectively the slaves named in the petition, and that the defendants pay costs in both courts.

Morris & Rost for the plaintiff, *Bullard & Holkam* for the defendants.

COMPTON & AL vs. PATTERSON.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiffs brought suit as endorsees, on the defendant's note, he pleaded the general

An appeal lies from a judgment of dismissal. The indorsee cannot require that the payee be made a party and answer interrogatories.

issue, attacked the consideration of the note and prayed that the payee, his vendor, might be made a party, and be directed to answer interrogatories, which he propounded.

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vs.
PATTERSON.

The district judge allowed the vendor to be made a party and directed he should answer the interrogatories. The plaintiffs' counsel's objection to this were overruled, and he took a bill of exceptions.

The case was for several terms continued, and the plaintiffs as often pressed for judgment. It was at last dismissed, and they appealed.

It is urged an appeal does not lie from a judgment of dismissal, which is not final and works no irreparable injury, since the plaintiff is perfectly at liberty to renew his suit. So he may in the case of a non-suit, and be non-suited again, and renew his suit *ad infinitum*. Yet we have held that an appeal lies from a judgment of non-suit. *Chedoteau's heirs vs. Dominguez*. 7 *Martin*, 490. It lies from the discontinuance of a cause. *Brand & al. syndics vs. Shaumburg*, vol 1, 698.

The defendant's note was endorsed before its maturity, and between the endorsees and

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PATTERSON.

maker the consideration could not be gone into. *Hubbard & al vs. Fulton's heirs, id. 241.*

The district judge erred in allowing the payee and indorser to be made a party; if he abused the defendant's confidence, the latter must seek his remedy in a distinct action, and cannot on this account delay the plaintiffs recovery.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, that the order allowing the endorser to be made a party, and that directing him to answer interrogatories, be rescinded, and the case remanded with directions to the judge, to proceed therein according to law. The defendant and appellee paying costs in this cause.

Wilson for the plaintiffs, *Thomas* for the defendant.

COLLINS & AL. vs. McCRUMMEN & AL.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court.
This is an action for goods, wares and mer-

A witness
who acknow-
ledges he is res-
ponsible for
costs, but has
the means re-

chandize, sold by the plaintiffs to the defendants. The latter severed in their answers:

K. McCrummen pleaded the general issue—and that if the debt existed it was contracted by D. McCrummen, who discharged it by a note of Stewart & Scott, given to the plaintiffs through their agent—that the petition does not state the goods alleged to have been sold—that they were not purchased for the firm of K. & D. McCrummen.

D. McCrummen pleaded the general issue, and that if he ever was indebted to the plaintiffs, he has long since paid them.

The plaintiffs had judgment, and the defendants, K. McCrummen appealed.

Morgan deposed he presented the plaintiffs account to D. McCrummen before the dissolution of the partnership, and he always promised to pay it. The deponent thinks the partnership was dissolved about a year after: he does not recollect this exactly, but thinks he does not err much in the time. D. McCrummen acknowledged his obligations to the plaintiffs for their indulgence. About one month after, \$13 40 cents were charged for interest, at 7 per cent. The demand was made on D. McCrummen. The deponent is sure this was several months before

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vs.
M'CRUMMEN
& AL.

cured to pay
them, is not in-
competent.

A note endorsed by one partner, does not render the endorsee responsible to the firm for latches. The goods sold need not be described in the petition when the defendant has assumed payment of the amount.

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& AL.

the dissolution of the partnership. D. McCrummen promised to pay interest at 7 per cent. K. McCrummen never promised to pay any, nor was the case mentioned to him at any time, till lately. Stewart & Scott's note was to be received in payment, if punctually paid, and a receipt was given to that effect. Sexton & Morgan have funds of the plaintiffs to satisfy the costs. The deponent has no interest individually. A month before Stewart & Scott's note became due, they both saw it would not be paid, and it was unnecessary to put it in bank and put the parties to costs. K. McCrummen was never the active man of business, therefore no demand was made upon him.

Stewart deposed that Stewart & Scot gave a note to Sexton & Morgan, which has not been paid—it was to be paid to the plaintiffs. When it became due, D. McCrummen was indebted to Stewart & Scott.

The note was produced, as well as the act by which the partnership was dissolved.

Our attention is first called to a bill of exceptions to the opinion of the judge *a quo*, overruling an objection to the competency of Morgan, who is bound for the costs of the suit. He swears he has funds of the plaintiffs in his

hands to pay the costs. His liability to costs is not proven otherwise than by what falls from him in his examination, and in the same way it is shewn he has funds to meet the charge, which in our opinion justified the judge in admitting him.

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& AL.

The evidence establishes the existence of the partnership, and that while it lasted, D. McCrummen admitted the money was due, on the account presented against the firm, promised to pay it *with interest*, after a certain delay. This destroys the effect of the plea of the general issue.

It is true, the plaintiffs received a note, which if punctually paid, was to be a payment. But it was not. It is, however, urged, the plaintiffs made themselves liable by their neglect, as endorsees. The record shews the note was payable to D. McCrummen, and he alone endorsed it. To him alone, and not to the partnership they are accountable for any neglect or laches in the collection of the note. The note is produced, and it is shewn, the endorser, D. McCrummen, is indebted to the maker.

An objection was taken to the sufficiency of the petition, viz: That the goods, alleged to have been sold, are not described. The gist of

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M'CRUMMEN
& AL.

the action is the promise made on the production of an account, in which the plaintiffs were charged generally for sundry merchandize, \$294—that it would be paid within a certain period, which the plaintiffs granted. Now, had the plaintiffs stated a detached account, they could not, perhaps, have easily produced proof that the goods charged were those the payment of which was promised.

The payment of conventional interest, as promised verbally, was rightly disallowed.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiffs, *Bullard & Scott* for the defendants.

LOCCARD vs. BULLITT.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The first question to be decided in this case, is on an application for a new trial. It was bot-tomed on an affidavit of the plaintiff, which stated, "that he had discovered new and im-

The court,
not the party,
must judge
whether due di-
ligence has been
used to procure
testimony.

portant evidence in his behalf, which he could not, by using reasonable diligence, have discovered before; and that he believed he could prove by it, certain facts material to his case."

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LOCCARD
vs.
BULLITT.

It is the opinion of the court, that that of the first instance did not err in considering this affidavit as insufficient. It is too loose and general; and the party making it, if he swore falsely could not have been convicted of perjury. It should have stated the names of the witnesses, if the testimony expected was parol; or if written, its nature, and where it had been found; *for the court, not the party, must judge whether reasonable diligence was used.*

We have examined the evidence, and see nothing to authorise us to come to a different conclusion from that of the district court.

It is therefore ordered, adjudged and decreed, that the judgment be affirmed with costs.

Rost for the plaintiff, *Bullard & Holkam* for the defendant.

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HEIRS GAGUE

vs.

GAGUE & AL.

Heirs may
sue the widow
in the district
court for a di-
vision of the
common estate.

HEIRS OE GAGUE vs. GAGUE & AL.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court.

The plaintiffs demand the part of the estate of their father, in the hands of his widow and the other defendants. The district court thought it had no jurisdiction of the case, and non-suited the plaintiffs.

We think it erred. The plaintiffs alleged they are common in goods with the widow, the community which subsisted between their ancestor, and is still subsisting between them and her, and as such they demand their part of the general property. The partition may be sued in the district court. The Civil Code, 176, art. 133, in giving jurisdiction to the court of probates, does not give it exclusively. *Turner vs. Croft*, vol. 1. 370, and *Broussard vs. Bernard & al.* decided last month at Opelousas ante 37.

The case not having been passed upon the merits cannot be examined here.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and the

case remanded, with directions to the judge to proceed therein according to law. The costs in this case to be borne by the defendants and appellees.

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Rost for the plaintiffs, *Bullard & Morris* for the defendants.

FOURNIER vs. LANDREAU.

APPEAL from the court of the sixth district.

Laws are not
presumed to
have a retros-
pective opera-
tion.

PORTER, J. delivered the opinion of the court. This is a case brought up by the appellee under the act of Assembly, passed the first of March, 1822. The appeal appears to have been taken previous to the passage of the statute; and the question presented is, whether it has a retrospective operation. The words of the law are, "when any appeal shall be allowed," the appellee shall be at liberty to bring up the appeal. It appears to us the act contemplated cases that should hereafter arise; such is the literal meaning of the words used, independent of the general rule of construction that laws can never be presumed to have a retrospective operation. *Civil Code*, 4. art. 7.

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FOURNIER
& C.
LANDREAU.

It is therefore ordered, adjudged and decreed that the appeal be dismissed at the cost of the appellee.

Wilson for the plaintiff, *Johnston* for the defendant.

There was not any case determined during the months of October or November.